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NSON,

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1065. 144

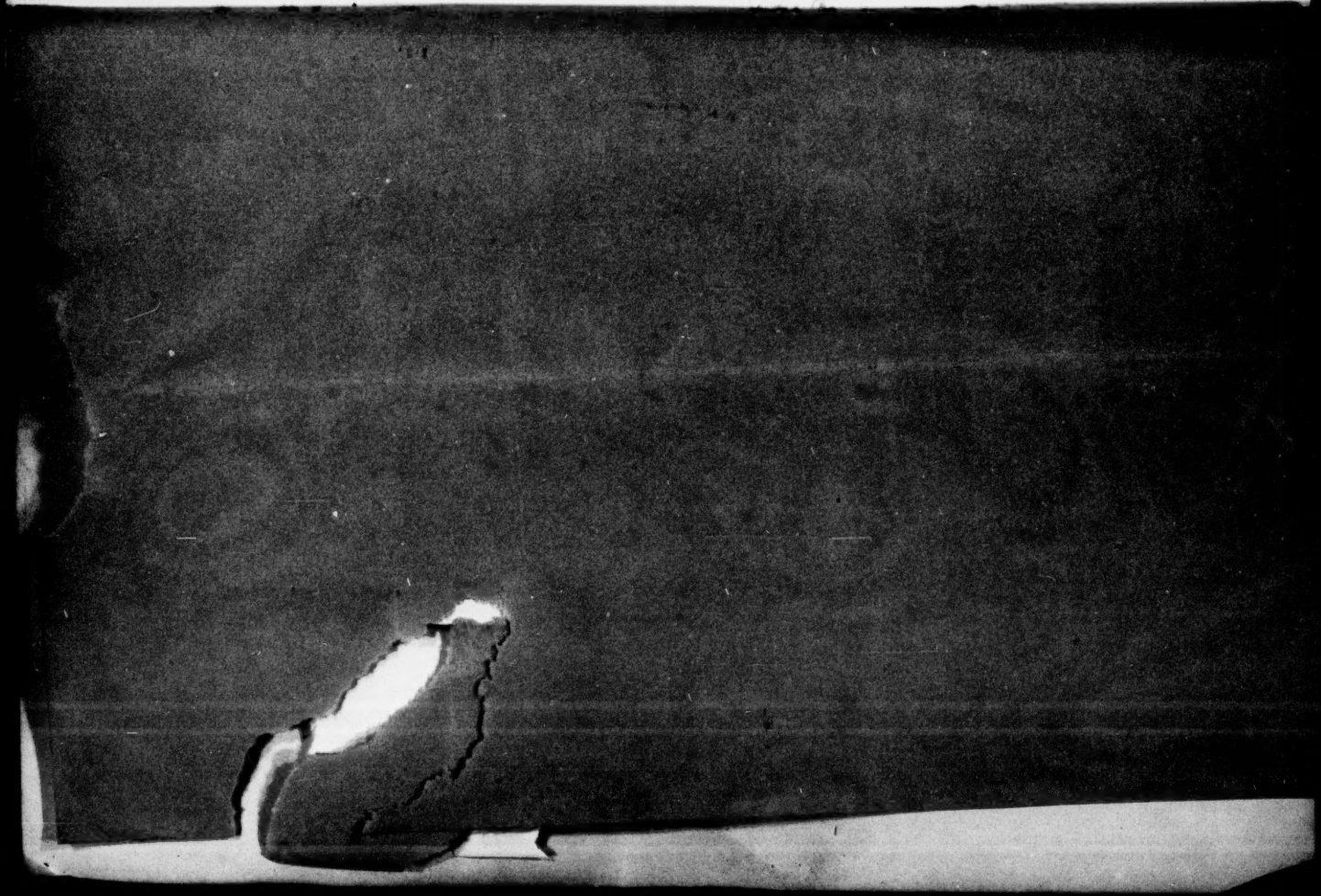
JAMES H. EMBRY, ADMINISTRATOR OF R. J. ATKINSON, DECEASED, PLAINTIFF IN ERROR,

vs.

J. W. STANTON AND W. L. PALMER.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED NOVEMBER 11, 1879.



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INDEX.

	Original.	Print.
Petition	1	1
Summons	8	5
Demurrer	9	6
Answer	11	8
Committee's report	17	12
Exhibit attached to report (record of proceedings in supreme court District of Columbia.)	21	15
Statement of case	43	30
Decree	60	40
Motion in error	61	41
Judgment	65	42
Certificate of clerk	65	43
Writ of error	66	43
Citation	68	44
Bond	70	44

1 Supreme court of errors, second judicial district, New London County, March term, A. D. 1878.

J. W. STANTON AND W. L. PALMER
vs.
JAMES H. EMBRY, ADM'R.

Superior court, New London County, November term, A. D. 1877.

To the honorable superior court to be held at Norwich, within and for the county of New London, on the first Tuesday of November, A. D. 1877:

The petition of Joseph W. Stanton and William L. Palmer, both of Stonington, in said county, respectfully represents:

First. That said petitioners were residents and citizens of Louisiana for many years prior to the late rebellion; but when that became flagrant, they resumed, in 1861, their old residence and citizenship in this State.

Second. That whilst residents of Louisiana they transacted a large towing business, and had several valuable steam tug-boats engaged therein, which on the restoration of the national authority were seized by officers of the national government, and used, abused, and lost by them, so that four distinct claims arose against the United States in favor of your petitioners, as follows:

A. For the loss of steamer Anglo-American, which was entrusted to William Johnston, a counsellor-at law, and collected on a fee of five per cent. said claim, amounting to $30,000.

B. For repairs, &c., to steamers Anglo-American and St. Charles, entrusted to said William Johnston, R. J. Atkinson, and John Joliffe, all three counsellors-at-law, who collected the same, March 29th, 1866, and charged five per cent., per agreement, on the collection for their services, said claim amounting to $12,053.45.

C. For services of steamer St. Charles, collected in 7-30's United States bonds, by R. J. Atkinson, who deducted therefrom five per cent. in bonds, and remitted the remainder. Out of the deduction he was entitled to one-half for his services, viz, $1,534.46; said claim amounting to $61,371.92, and collected by him on the 29th of April, 1865.

2 D. The last claim was for services of steamers Anglo-American and St. Charles, amounting to $45,925.91, which was collected by said William L. Palmer, about the 10th day of March, 1871.

Third. The petitioners would further represent that after the collection of the above mentioned claim C, there remained in the hands of said Atkinson the sum of 1,534.46, due to the petitioners; and after the collection of the above claim D, the petitioners were bound to pay, by special written agreement with said Atkinson, a fee of five per cent. on the amount collected, viz, on $45,925.91, which amounts to $2,296.29, deducting what the said Atkinson owed to the petitioners from the amount by them to him, throwing aside and giving to said Atkinson the benefit of the interest to date, and there remained due to him on March 7th, 1871, the sum of $761.83, and no more; with interest the amount due said Atkinson was less than $300.00.

Fourth. The petitioners would further represent that said Atkinson died February 25th, 1871, and the warrant for said $45,925.91 issued March 7th, 1871; and that James H. Embry, a resident of the District of Columbia, was duly appointed administrator of the estate of said

deceased, by the honorable supreme court of said District, sitting in probate matters, and accepted said trust, and was duly qualified as such administrator; that all the books and papers of said Atkinson went into the custody and control of his said administrator, who, before September 23d, 1871, sent the claim of said Atkinson for his professional services in prosecuting the petitioner's said claim D to George Pratt, Esq., counsellor-at law, residing in said Norwich, and specifying in his bill of particulars a full statement of said claim in words and figures as follows:

J. W. Stanton and W. L. Palmer, to estate of R. J. Atkinson, dec'd, Dr.

To am't due for professional services of R. J. Atkinson, in prosecution of claim against the United States for the services of the steamer Anglo-American, from May 22d to July 28th, 1862, and for services of steamer St. Charles, from April 27th to July 28th, 1862, being five per cent. of amount allowed by United States.

Amount allowed by United States	$45,925 17
Amount due estate	$2,296 25

3 All of which was in conformity to the written agreement between said Atkinson and the petitioners, and to the books of account and papers of said Atkinson, in the hands of his said administrator, and that this statement was made by said administrator and forwarded to his said attorney, Pratt, at the request of the petitioners, or one of them. Upon the receipt of this paper from said Pratt, on or about the 25th of September, 1871, the petitioner, Stanton, replied to said Pratt, admitting the five per cent. claimed, but averring that the commissions were paid by the appropriation of other moneys, as hereinbefore stated, and offering to submit the matter to arbitration; but this reply being unsatisfactory, a suit was commenced by said Embry, as administrator of said Atkinson, against the petitioners to recover the amount above stated, viz, $2,296.25, returnable to the term of this court, held at Norwich, in and for said county, on the third Tuesday of November, 1871. Said suit was withdrawn at the March term of this court, 1872.

Fifth. The petitioners would further represent, that on the 13th day of January, 1872, said Embry, administrator as aforesaid, entered another suit against the petitioners on the law side of the honorable supreme court of the District of Columbia, and served process therein on the petitioners January 15th, 1872, but instead of claiming the five per cent. on the amount collected, in conformity to said written agreement, and the books and papers of said Atkinson, and his own bill of particulars served upon the petitioners by his attorney, Pratt, as aforesaid, demanded ten thousand dollars on a quantum meruit; and after a verdict, judgment, and writ of error to the Supreme Court of the United States, he has succeeded in obtaining an execution against the petitioners for the sum of $9,185.18, with interest from March 13th, 1873, and all costs of suit; he, said Embry, well knowing that when said verdict and judgment were rendered, his decedent was entitled to only five per cent. on the amount collected, viz, $2,296.25, and this on a special agreement between said decedent and the petitioners, contained in the letters of said decedent, copies of which were before him.

Sixth. The petitioners would further represent, that one of them, said Palmer, at the time of said trial before the jury, was absent from the District of Columbia, and though telegraphed to, was unable to

4 reach Washington, the place of trial, in time to be present thereat, it being impossible to tell in advance, with any certainty, what day any case will come on, and the notification by telegraph was too short. The other petitioner, said Stanton, was lying sick in bed at the Kirkwood House, in said Washington, and unable to attend said trial. That he endeavored to procure a postponement of said trial, but without success. That since the trial and the disposal of said case, at the general term of said court, the said Stanton has re-examined the masses of papers connected with the business of the petitioner's boats at New Orleans, Louisiana, and which were stored for safe keeping at his domicile in this State, and has then and there found two letters from said Atkinson, one dated Washington, Feb. 18th, 1870, and one dated May 7th, 1870, directed to said J. W. Stanton at Stonington, Connecticut, and agreeing, stipulating, and contracting that the fees in this business, meaning the claim D, above set forth, stated to be five per cent., was "entirely satisfactory," as by said letters ready in court to be shown will fully appear; and your petitioners further show that said J. W. Stanton, the managing partner, and active partner of the old firm of Stanton & Palmer, had long retired from business when said suit was brought. That he was advanced in years. That he had not been in the habit, after leaving off active business, of classifying or indexing his letters; that for several years prior to the commencement of this suit, and after it had been commenced, his mind had been greatly depressed by domestic bereavement caused by the long and painful sickness of his wife, and his mental anxiety and grief at her death wholly unfitted him for business, and seriously impaired his bodily health. That after the commencement of said suit he made search for all letters and papers in his possession relating to the business of said boats and his correspondence with said Atkinson, in relation to the collection of said claims, and all matters relating thereto, and placed all such papers as he could find into the hands of his counsel in said suit, and he then supposed that he had found and placed in the hands of said counsel all of said papers. That upon the discovery of said letters, he immediately placed the same in the hands of his counsel, but too late for use in the court below—said suit having then been appeale l to the Supreme Court of the United States.

5 Seventh. The petitioners would further represent that said suit at law was brought to recover against the petitioners on a quantum meruit, and verdict and judgment were rendered thereon for $9,185.18, with interest from March 13th, 1873, when to the knowledge of said Atkinson, whilst living, and, as the petitioners aver, to the knowledge of said Embry, as his administrator, the true amount due to said Atkinson for his services, when the amount was received by the petitioners from the United States, was but $2,296.25 on a special contract and agreement for that amount, when the money was recovered, as above set forth. And the petitioners aver that said Embry, administrator as aforesaid, in withdrawing his said suit and bill of particulars from this court, and instituting said suit in the supreme court of said District of Columbia, with his knowledge of the facts of the case and the actual fee agreed upon between the petitioners and said Atkinson for his services in relation to said claim D, is estopped in equity from claiming and recovering more than that sum from your petitioners, and from taking advantage of the temporary defects in your petitioners' proofs; that his said judgment at law was obtained by the suggestio falsi; that he was entitled to a quantum meruit, and not to a stipulated fee of five per cent. on the amount collected.

Eighth. The petitioners would further represent that said Embry, as such administrator, has commenced an action of debt against them on said judgment, to recover the amount thereof, with interest and costs, which suit was returnable to the term of this court held at New London, in and for said county, on the second Tuesday of September, 1877, which was duly served upon the petitioners, and was returned to and entered in the docket of said court. That at said term the said Embry appeared by Daniel Chadwick, esq., of Lyme, in said county, his attorney, and moved said court for a judgment against the defendants in said action. That the petitioners appeared by Hon. L. F. S. Foster, and J. Halsey, esq., their attorneys, who informed said court that the petitioners had an equitable defense against the enforcement of said judgment at law, and prayed said court that said cause might be continued to the term thereof, to be held at Norwich, on the first Tuesday of November next, in order that the petitioners might be enabled to file their petition in said court, praying for equitable relief, and an injunc-
6 tion against the further prosecution of said suit, which motion was allowed by said court, and said cause was ordered to be continued accordingly.

Ninth. The petitioners would further represent that they have no adequate remedy at law to protect themselves against this unconscientious judgment, but must be subjected to the payment of the same, and be forever deprived of their just rights in the premises unless relieved by the equitable powers of this honorable court. That the said judgment was obtained by wrong, and a hard conscience, awards the administrator four times the amount of his decedent's written contract, works the petitioners an irreparable injury if enforced; and said administrator, the plaintiff in said suit, should be perpetually enjoined by this court from prosecuting the same, and from in any manner enforcing said judgment against the petitioners, upon the payment by them of said agreed sum of five per cent. upon the amount collected, viz., $2,296.25, which is more than he is actually entitled to, for the reasons hereinbefore set forth in paragraph third, and which amount the petitioners hereby tender and offer to pay to said Embry, as such administrator, in full for all just indebtedness on their part to the estate of said decedent, Atkinson.

The petitioners therefore pray this court to order and decree—

First. That said Embry, administrator as aforesaid, be ordered to make a full discovery of all the decedent, Atkinson, did during his lifetime as attorney in the petitioners' behalf, what sums of money he collected, what rate of fees he charged to the petitioners upon his, the decedent's books, what letters the decedent wrote to the petitioners, or either of them, touching fees, and of which he retained copies. Where the said administrator obtained the items of his bill of particulars set forth in paragraph fourth, and the five per cent. fee or commission therein, and the amount in his hands, as administrator, in money or in 7.30 bonds or their proceeds, now belonging to the petitioners and resulting from the transactions set forth in paragraph third; why he began suit in the District of Columbia during the pendency of the suit he brought against the petitioners in this court, and whether it was not to avoid the contract for five per cent., and to obtain more than five per cent. if possible?

Whether he ever saw copies of any such letters as those stated in
7 paragraph fifth, before said suit was entered in the supreme court of the District of Columbia; and if so, when and where, and whether at this time such copies do not exist in his possession or under his control?

Second. That said Embry, administrator as aforesaid, may set forth a full, true and just account of all the transactions between the decedent and the petitioners, showing the amounts of money and property received by the decedent for account of the petitioners, and how paid.

Third. That said respondent may set forth an account of all and every sum and sums of money received by decedent, R. J. Atkinson, for, or in respect of the petitioners' claims on the United States as stated and set forth in the several paragraphs of this petition, and when, and from whom, and upon what in particular all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

Fourth. That the said respondent may set forth a list or schedule and description of every deed, account, book, letter, paper or writing relating to the matters aforesaid, or any of them, or wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which now are or ever were in the possession or power of said respondent; and may particularly describe which thereof are now in his possession or power, and may deposit the same in the office of the clerk of this court for the usual purposes; and otherwise that said respondent may account for such as are not in his possession.

Fifth. And that said respondent may be perpetually restrained and enjoined from the further prosecution of said suit upon said judgment recovered by him against the petitioners in the supreme court of the District of Columbia, and from executing or in any manner enforcing said judgment against the petitioners, as soon as the petitioners have paid to said respondent the amount which may be found due, if any, to the respondent, on a final decree in this suit.

Sixth. And that this court would grant to the petitioners such other or further relief as in equity and good conscience they may be entitled to; and the petitioners, as in duty bound, will ever pray.

Dated at Norwich, this 18th day of October, A. D. 1877.

JOSEPH W. STANTON.
WILLIAM L. PALMER.
By J. HALSEY,
Their Attorney.

8 To the sheriff of the county of New London, or his deputy, greeting:

By authority of the State of Connecticut you are hereby commanded to summon James H. Embry, of Washington, in the District of Columbia, administrator of the estate of R. J. Atkinson, late of said Washington, deceased, to appear before the supreme court to be held at Norwich, within and for the county of New London, on the first Tuesday of November, A. D. 1877, then and there to show reasons, if any he has, why the prayer of the foregoing petition should not be granted.

Hereof fail not, and make due and legal service and return.

Dated at Norwich, this 18th day of October, A. D. 1877.

JEREMIAH HALSEY,
Justice of the Peace.

STATE OF CONNECTICUT,
New London County, ss:

JOSEPH W. STANTON AND WILLIAM L. PALMER
vs.
JAMES H. EMBRY, ADMINISTRATOR OF R. J. Atkinson, deceased.

NORWICH, *October* 18*th*, 1877.

It being shown to the undersigned authority that the said respondent resides out of this State, at Washington, in the District of Columbia—It is ordered, that notice of the pendency of said petition be given to said James H. Embry, administrator, as aforesaid, by some person indifferent, by depositing in the post office at said Norwich a true and attested copy of said petition and citation and of this order, sealed up, postage paid, and directed to James H. Embry, Washington, D. C., at least twelve days before the session of the court to which said petition is returnable, and also leave with, or at the usual place of abode of Daniel Chadwick, of Lyme, in said county of New London, attorney of said Embry, a like true and attested copy of said petition, citation and order, at least twelve days before the session of said court.

WEBSTER PARK,
Clerk of the Superior Court in and for said County.

9 STATE OF CONNECTICUT,
New London County, ss:

LYME, *October* 20*th*, *A. D.* 1877.

Then and there I made service of the foregoing petition, by leaving a true and attested copy of said petition, citation and order of notice at the usual place of abode of the said Daniel Chadwick.

Attest:-

JOHN C. AVERILL,
A Person Indifferent.

STATE OF CONNECTICUT,
New London County, ss:

NORWICH, *October* 22*d*, *A. D.* 1877.

Then and there I made service of the foregoing petition, by leaving, depositing in accordance with said order of notice, a true and attested copy of said petition, citation and order of notice, sealed up, postage paid, in the post office at said Norwich, addressed to said James H. Embry, at Washington, D. C.

Attest:

JOHN C. AVERILL,
A Person Indifferent.

Fees: Copies, $9.00; travel, 6.20; endorsement, 36; service, 24; postage, 15—$15.95.

Respondent's demurrer.

Superior court, New London County, November term, 1877.

JOSEPH W. STANTON ET AL.
vs.
JAMES H. EMBRY, ADM'R.

The respondent, for answer to the bill of the petitioners, says that the same, and the matters therein contained, are insufficient in the law to entitle the petitioners to the relief prayed for in said petition; wherefore he prays judgment, that said bill be dismissed and he be allowed costs.

JAMES H. EMBRY, *Adm'r*,
By his attorney, D. CHADWICK.

And the plaintiffs say that the same are sufficient.

Judgment, &c.

By HALSEY AND FOSTER,
Their Attorneys.

10 At a superior court held at Norwich, within and for the county of New London, on the first Tuesday of November, A. D. 1877.

Present: Hon. Sidney B. Beardsley, judge; Webster Park, clerk; O. N. Raymond, sheriff.

Joseph W. Stanton and William L. Palmer, both of the town of Stonington, in said New London County, petitioners, vs. James H. Embry, of Washington, in the District of Columbia, administrator of the estate of R. J. Atkinson, late of said Washington, deceased, respondent—as by petition on file, dated the 18th day of October, A. D. 1877.

This petition was brought to the November term of this court, 1877, when the parties appeared, and were heard on a demurrer filed by said respondent; and the court, having heard the arguments of the parties, and duly considered the same, reserved the questions of law arising thereon for the advice of the supreme court of errors, at its next term to be held at Norwich, within and for the second judicial district, on the first Tuesday of March, A. D. 1878.

Attest:

WEBSTER PARK, *Clerk.*

A correct copy of record of the supreme court of errors.

Attest:

WEBSTER PARK, *Clerk.*

11 Supreme court of errors, second judicial district, New London County, March term, A. D. 1879.

J. W. STANTON AND W. L. PALMER
vs.
JAMES H. EMBRY, ADM'R.

Superior court, New London County, September term, A. D. 1878.

(The first ten pages of the record in this case, containing the petition, citation, order of notice, returns of service by the officer, the respondent's demurrer, and the record, showing that the parties were heard on

said demurrer, and that the superior court reserved the case for the advice of this court, were printed in the docket of this court, at the March term, 1878.

The case was thereupon heard in this court, who advised that the petition was sufficient. Hon O. S. Seymour was then appointed committee, who made his report to the superior court, at the September term, 1878, when this case was again reserved for this court, the record of which here follows :)

Respondent's answer.

In the superior court of New London County, Conn.

JOSEPH W. STANTON, WILLIAM L. PALMER
vs.
JAMES H. EMBRY, AD'M'R.

The respondent, James H. Embry, administrator of the estate of Robert J. Atkinson, saving and reserving all the exceptions, and hereby insisting and claiming, by way of demurrer, that the matters and things set forth in said petition are insufficient to entitle the petitioners to the relief prayed for, and not waiving his rights thereby in answer to said petition, or to so much as he is advised it is material to answer, saith :

That he admits the residence of petitioners as stated.

That he has no knowledge of the matters set forth in the second paragraph of said bill, except as appears from the correspondence, papers and books of said decedent Atkinson, in his possession, a full and complete copy of all entries from said books, so far as relate to the business of petitioner, is hereto attached, marked A.

Respondent further states in explanation of said claims identified in said petition as C and D, both being for services of the same vessels, that claim C was for such services after the 28th day of July, 1862, when petitioner's right to the ownership thereof was fully established, which claims was paid in May, 1865, and within a few months after the said Atkinson took charge of said cases; and that claim D was for services of said vessels prior to said date, and involved various
12 and complicated questions of law and fact, and was not settled and paid until March, 1871. That in addition to the three claims named by petitioners as B, C, and D, said Atkinson was employed by petitioners in the claim for coal, etc., taken by the United States from petitioners, in which claim the said Atkinson rendered professional services from the said month of February, 1865, until his death, and for which services, although such claim has been paid to petitioners, as respondent is advised, no fee or compensation has been paid to said Atkinson, or to respondent as administrator thereof.

It appears from the books of said Atkinson that the total amount collected by petitioners in the several cases marked B, C and D was nearly $120,000, exclusive of the coal claim, and adding the amount allowed in the coal case, the aggregate is about $140,000; and for all his services in said several cases Atkinson has received only about $3,300.

Respondent denies upon information and belief that there remained in the hands of said Atkinson, after the collection of claim C, the sum of $1,534 48, or any other sum, but that on the other hand there was a small balance due the said Atkinson on account of that transaction, as appears from the statement A, hereto attached.

Respondent denies upon information any special written agreement between said Atkinson and petitioners as to fees in the matter of claim D.

Respondent admits that said Atkinson died February 25th, 1871, and that said Atkinson left surviving him a widow and six children, all of whom, except one, as respondent recollects, were then minors.

Respondent also admits that the warrant or draft for said $45,925.91 (claim D) was delivered to said Palmer, as stated, but by law as well as by the custom of the department, the said Atkinson had a lien on the same for his fees, and that the Second Comptroller gave the order for the delivery of such draft to said Palmer only upon his assurance and promise, supported by Senator Anthony and Mr. Dixon, that said Atkinson's fees should be promptly paid.

Respondent admits his appointment, acceptance and qualification as administrator of said estate, as stated; also, that he came into possession of said decedent's books and papers.

Respondent also admits that he placed said claim into George Pratt's hands for collecting, and upon being requested made a statement of account as stated; but before doing so respondent wrote several
13 letters addressed to petitioners, or one of them, and receiving no reply wrote to Senator Buckingham, and in reply to the last letter received the letter hereto attached, marked B, and on the same day received a letter from said Stanton, hereto attached, marked C, denying any indebtedness to said decedent, Atkinson, and referring to Samuel Churchman for proof thereof.

Respondent denies that said account so sent to said Pratt was made out from or in conformity with any written agreement between the said parties, but that such account was so made out and presented for the reason that the books of said Atkinson showed that he had in other cases charged five per cent., respondent not then taking into consideration the fact of the great difference in the labor and time expended in the several cases; and in order to effect a settlement of the matter without litigation, and in the absence, as respondent believed, of any agreed fee, he was willing to receive five per cent. fees in settlement of such claims, for the said estate could not well afford the expense of a litigation in the matter, especially in a distant State.

Respondent further says that said Atkinson preserved no copies of the letters referred to in said petition of February 18th, 1870, and of May 7th, 1870, or of any letters written in said year of 1870 to petitioners, or either of them, relating to fees, except that there appears among his papers a paper purporting to be a letter dated February 13th, 1870, but not copied in the letter-book, in which there is a reference only to the disputed question of fees on claim C, collected in the year 1865.

Respondent, however, claims that petitioners are estopped from claiming or setting up, at this late day, any contract or agreement alleged to have been made or acknowledged by the letters referred to in said petition, for the reason among others that issues were made on the trial at law hereinafter set forth, whether there was any contract between said Atkinson and said petitioners, and, if so, what; and that all such issues were fully and finally determined and adjudicated by the trial, verdict, and judgment of the supreme court of the District of Columbia, and affirmed by the Supreme Court of the United States, as hereinafter more fully stated, which court had full and complete jurisdiction of said cause and issues so made and tried.

Respondent admits that through his said attorney he brought suit in this court for the purpose of recovering for such professional

services, but that in his declaration in said suit he claimed for such services of petitioners the sum of $10,000, in two counts, one in
14 indebitatus assumpsit, and one upon quantum meruit, as will more fully appear by reference to such record and declaration or writ, a copy of which is hereto attached marked E. Respondent admits that said declaration also contained a count upon an alleged agreement of petitioners to pay five per cent. upon the amount recovered on claim D, but that such count was so inserted solely to meet the possible contingency of such agreement being shown, and not from any knowledge respondent had on the subject.

Respondent also admits that said suit was withdrawn after the institution of another suit in the District of Columbia, as stated.

Respondent admits that in January, 1872, he commenced another suit against petitioners in the supreme court of the District of Columbia, and that process therein was served on petitioners on the 15th day of January, 1872; that respondent claimed in said last-named declaration $10,000 on a quantum meruit, and further says that petitioners appeared and plead to such declaration. That said suit came on to trial in said court before a jury; that a verdict was rendered in favor of respondent against petitioners on the 13th of March, 1873, for $9,185.18; that petitioners thereupon filed their several motions for new trial, one of which was based upon the allegation that the said verdict was excessive; and on the ground of newly discovered evidence; that said motion was overruled and an appeal taken by petitioners to said supreme court in general term; that on the 28th day of September, 1874, said court rendered judgment in favor of respondent and against petitioners for the amount of such verdict, with interest from the date of such verdict and costs. That petitioners prosecuted a writ of error upon such judgment to the Supreme Court of the United States, which court after argument of counsel affirmed said judgment with interest and costs, which last judgment was rendered on the 22d day of January, 1877, as by reference to the record and proceedings thereof now shown to the court will among other things more fully appear, and respondent prays that the same may be part hereof.

Respondent has no knowledge, except from said petition, whether said Palmer was absent from the District of Columbia, or whether said Stanton was lying sick at the time of such trial, nor does he remember whether Stanton endeavored to procure a postponement of such trial, but states that the petitioner's counsel was present and made a vigorous defense, as will more fully appear by the record of such trial.

Respondent further states that on said trial several witnesses
15 were examined by petitioner's counsel, among whom was Samuel Churchman, the agent of petitioners named in said letter of said Stanton, dated June 21st, 1871, and marked C, hereto attached; also, divers and sundry papers and documents were placed before the said jury. That respondent had in court the books of said Atkinson, and was ready and willing to produce the same as well as any papers that might have been in his possession, but whether the said letters of February 18th, 1870, and of May 7th, 1870, were read to the jury, or what other specific evidence was there introduced respondent has no means of stating, for the reason that the bill of exceptions tendered by petitioner's counsel purports to contain but a portion of such evidence, and only a general statement thereof on such points as related to and were in explanation of the instructions prayed for by him, and respondent prays to refer to the said record now before the court for greater certainty. Respondent, however, states that such letters were, as of right they

should have been, in the possession of petitioners, and could, during the long period that said suit was pending, have been found and produced with the exercise of ordinary diligence by said petitioners Stanton and Palmer; and respondent submits that even if he had in possession copies of such letters, or of any other letters relating to any agreement as to fees, he was not bound or required or even requested to produce the same. Wherefore respondent demurs to said portion of said petition. Respondent further states that evidence was introduced by petitioners, on said trial, which was claimed by them as showing a contract of fees, in said case, to be paid only in the event that said Atkinson collected the said claim; also that such contract was for five per cent., as now claimed, but that the jury found both of said issues in favor of respondent, and for greater certainty respondent refers to said record.

Respondent admits that such suit was brought upon a quantum meruit, but denies that it was so brought to avoid any contract or agreement between said decedent and petitioners, and denies that he then knew nor does he now know of any contract or agreement between said parties as to fees, and insists that even if any such contract or agreement had been entered into, proof of the same was admissible under the said pleadings, and avers that the evidence was introduced thereunder without objection, which was claimed as tending to prove such contract, as will more fully appear by reference to the record of such trial.

16 Respondent admits that he has commenced suit upon said judgment in order to obtain execution thereof from this court.

Respondent further saith that the petitioners are not, as he is advised by counsel and believes, entitled to the discoveries and production of the books, papers, documents and letters sought; that all the books, papers, documents and letters remaining of the effects of said Atkinson are, and were at the time of the trial of said cause, in the supreme court of the District of Columbia, in said District and subject to the jurisdiction of said court, and he therefore pleads and sets up said judgment in bar of such order or decree.

Respondent further says that nearly six years have elapsed since the commencement of said suit in the supreme court of the District of Columbia; that fourteen months elapsed since the commencement thereof before trial, and the further period of eighteen months before judgment of said court; wherefore he respectfully submits whether petitioners have shown such diligence in looking up evidence, of which they had full knowledge and which was in their possession, as to review the action and judgment of said court at this late day.

And he prays to be hence dismissed with his reasonable costs.

JAMES H. EMBRY,
Administrator of R. J. Atkinson, deceased.

DISTRICT OF COLUMBIA,
County of Washington, ss:

James H. Embry, being duly sworn, says that the foregoing answer signed by him is true, except as to the matter stated to be on information and belief, and as to those matters he believes it to be true.

JAMES H. EMBRY.

Subscribed and sworn to before me, this 21st day of November, A. D. 1877.

[L. S.] W. T. JOHNSON,
Notary Public.

And the respondent to the bill of the petitioners doth further answer and say, that the same, and the allegations therein contained, except as hereinbefore admitted to be true, are not true.

JAMES H. EMBRY,
Adm'r of R. J. Atkinson, deceased.
By his attorney, D. CHADWICK.

17 (The exhibits attached to this answer, and marked A, B, C, and E, now on file in the clerk's office, by request, are not printed.)

Committee's report.

To the honorable superior court, in and for the county of New London:

The subscriber having been by said court appointed committee to hear the evidence and report the facts in a petition in equity pending in said court, wherein J. W. Stanton and W. L. Palmer are petitioners, and James H. Embry, as administrator of the estate of R. J. Atkinson, deceased, is respondent, respectfully report:

That I took the oath by law provided, and met the parties by their agreement at Norwich, on the 24th day of June, 1878, and on the 11th and 12th days of July, 1878, when and where the parties appeared and were fully heard with their witnesses, exhibits, and arguments of counsel, and on said hearing I find the facts as follows:

The petitioners had the four distinct claims against the United States set forth in their petition, to wit:

A. For the loss of steamer Anglo-American, which was entrusted to William Johnston, a counsellor at law, and collected on a fee of five per cent. Said claim amounting to $30,000.

B. For repairs, etc., to steamers Anglo-American and St. Charles, entrusted to E. Johnston and John Joliffe, and the deceased, R. J. Atkinson, all three counsellors at law, who collected the same March 29th, 1866, and charged five per cent., per agreement, on the collection for their service, said claim amounting to $12,053.45.

C. For services of steamer St. Charles, collected in 7-30s United States bonds, by said Atkinson, who deducted thereupon five per cent. in bonds, as his fees for collection, and remitted the remainder. Said claim amounting to $61,371.92, and collected by him April 29th, 1865.

D. The last claim was for services of steamers Anglo-American and St. Charles, amounting to $45,925.91, in the presentation of which claim the said Atkinson acted as the attorney for the petitioners from 1865 down to the time of said Atkinson's death, which occurred February 25th, 1871; the claim was collected March 10th, 1871, by said Palmer.

18 After the collection of the above claim D, the petitioners were bound to pay to the administrator of said Atkinson a fee of five per cent. on the amount collected, to wit, a fee of $2,296.29. This fee was due by virtue of a special agreement, which special agreement was recognized in the clearest manner in letters which passed between the parties in 1870. The fact that the deceased was entitled to this five per cent. commission by special agreement, and that he was not entitled, under a quantum meruit to more than this stipulated commission, was proved before me by the letters aforesaid, and also by uncontradicted verbal testimony.

In regard to the allegations in the petition that after the collection of claim C there remained in the hands of said Atkinson the sum of $1,534.36 due to the petitioners, I find that from 1865 onward there was

a difference between the parties in respect to the fees for collecting claim C. The petitioners claiming that said Atkinson was entitled only to two-and-one-half per cent. for his individual fees in that case; and said Atkinson claiming and retaining as his fees five per cent.

In 1870 a correspondence was had between the parties on this subject, and Mr. Atkinson evidently understood the petitioners to consent to his retaining five per cent.

Upon this correspondence and upon the whole evidence, and upon the circumstance that in the trial at Washington, hereinafter mentioned, no claim was made by said Stanton and Palmer in regard to this $1,534.36, I find that nothing was or is due the said Stanton and Palmer on account of claim C, and that a balance of $2,296.29 became justly due from Stanton and Palmer to said administrator on the collection March 10, 1871, of said claim D, against the United States, which balance is still due and unpaid.

Said Embry was duly appointed administrator of the said Atkinson, and all the books and papers of said Atkinson went into the custody and control of the administrator; and he sent said Atkinson's account for his professional services to George Pratt, esq., as particularly stated in the petition, which account was forwarded by said Pratt to the petitioners.

The petitioners refused to pay this account, claiming to have legal defense against it, and also claiming an off-set of $1,534.36. A suit
19 was thereupon commenced on the premises by Mr. Embry, as administrator of said Atkinson, against the said Stanton and Palmer, returnable to the superior court of New London County November, 1871, demanding $10,000, with general counts on a quantum meruit, and with a special count for a commission of five per cent. Said suit was withdrawn March, 1872. On the 13th day of January, 1872, said administrator entered another suit against the said Stanton and Palmer, on the law side of the supreme court of the District of Columbia, and served process thereon on the said Stanton and Palmer, January 15th, 1872, a full copy of the record of which suit is hereto annexed, to which record reference may be had to show the proceedings therein. At (the time of) the trial of this case at Washington, neither Mr. Stanton nor Palmer were present in court. Mr. Palmer was at Stonington; his attendance might have been secured by reasonable diligence, if such attendance had been deemed very important. Mr. Stanton was ill at his hotel in Washington—too ill to attend the trial. His counsel asked for a postponement on that account, but no affidavit was offered in support of the motion, and it was denied. The petitioner's counsel appears to have been content to proceed with the trial in the absence of his clients. He had full and, as it turned out, undue confidence in the legal defenses, which appear by the record to have been set up at the trial, and took it for granted that in no event could more be recovered than $2,296.29. The letters of Mr. Atkinson of February 18, 1870, and May 7, 1870, recognizing the special agreement for five per cent. on claim D were not in Washington at the trial there; they were received by Mr. Stanton, the active partner, at a time when his mind was much depressed; they were stored for safe keeping at his home in Stonington, Connecticut, and the contents had escaped his recollection; they were not found by him until after the trial and the disposal of the case at the general term.

After the commencement of the suit at Washington he made search for all letters and papers relating to the case, and placed in possession of his counsel such as he found; and he then supposed that he had

found and placed in the hands of counsel all the letters and papers pertaining to the matters in suit. As bearing on the question how
20 it happened that these letters escaped the recollection of Mr. Stanton, it appears that for several reasons the attention of the petitioners was not alive to the importance of being prepared at the trial in Washington with the proof of the special agreement which the letters furnished: (1) Because the petitioners took it for granted that the full extent of the plaintiff's claim at the trial would be $2,296.29, that being the amount of the claim D presented through Mr. Pratt; and it did not occur to them that a larger amount might be claimed under the quantum meruit count. (2) Because their counsel had undue confidence in legal defenses against the entire demand, and therefore did not apprehend the full importance to the interests of his clients of being prepared with proof of the special agreement.

As to specification 7th in the petition, Mr. Atkinson, while living, had full knowledge that the amount due him was but $2,296.29, on a special contract for that amount, and he, if living, could not, with a good conscience, have presented a claim for a greater amount. Mr. Embry, the administrator, knew that Messrs. Stanton and Palmer claimed a special contract, and was willing before trial was brought to settle on that basis; but his claim in court on a quantum meruit was not on his part an intentional suggestio falsi. He did not know that the claim was unfounded; the full proof of the special agreement was not in his possession, and had not been fully brought to his knowledge.

The allegations of the petitioner under its 8th specification are found true as therein stated. In respect to respondent's answer, the answer truly sets forth in Exhibit A the entries in Mr. Atkinson's books.

The claim mentioned in the answer for services in the coal matter was, by mutual consent of parties, withdrawn, as being irrelevant to the present controversy.

The payment of draft for $45,925.21 to Mr. Palmer was made upon Mr. Palmer's assurances, as stated in the answer. The statement in the answer regarding the letters from Senator Buckingham and Mr. Stanton, marked B and C, is correct; also, regarding no copies having been preserved of the letters of February, 1870, and May 7, 1870, Mr. Atkinson, at the date of those letters, being in feeble health.

In respect to that part of the answer which relates to lapse of time the dates are correctly given.

In respect to that part of the answer which avers that the let-
21 ters of February 18, 1870, and May 7th, 1870, could have been found and produced at the trial in Washington with the exercise of ordinary diligence by said petitioners, I have in the foregoing report found specially the facts bearing upon that question, and upon those facts submit the question to the court. The respondent claimed that the record of the trial and judgment at Washington was conclusive of the rights of the parties, and that no evidence was admissible to show that the facts were otherwise than as found by that record. The evidence offered by the petitioners was received subject to all legal exceptions, with the right to take these exceptions to the court.

All of which is respectfully submitted, July 31, 1878.

ORIGEN S. SEYMOUR,
Committee.

Committee's fees and expenses, $125.

EXHIBIT ATTACHED TO COMMITTEE'S REPORT.

Declaration.—Filed 13 *Jan.*, 1872.

In the supreme court of the District of Columbia, this 13th day of January, 1872.

JAMES H. EMBRY, ADMINISTRATOR OF THE estate of Robert J. Atkinson, deceased, plaintiff,
vs.
JOSEPH W. STANTON, WILLIAM L. PALMER, defendants.
} At law. No. 9216.

The plaintiff sues the defendants for services performed and rendered by the said Robert J. Atkinson, in his life-time, as attorney for the said defendants and at their request.

Also for moneys paid, laid out, and expended by said Robert J. Atkinson during his life-time for the defendants at their request.

And the plaintiff claims ($10,000) ten thousand dollars, with interest from the 1st day of May, A. D. 1871, according to the annexed particulars of demand.

LANDER & MERRIMAN,
Plaintiff's Attorney.

22 The defendants are to plead to this declaration on or before the next special term of the court, occurring twenty days after the service hereof; otherwise, judgment.

LANDER & MERRIMAN,
Attorneys for Plaintiff.

Bill of particulars.

J. W. Stanton and W. L. Palmer to R. J. Atkinson.

1870, Feb. 3.—To services in prosecution of your claim against the United States before the Third Auditor and Second Comptroller, from the year 1865 to date, $10,000.00.

To subsequent services in same case before the Secretary of Treasury and other Treasury officials, by said Atkinson and by plaintiff as administrator, included in the above.

Summons.

In the supreme court of the District of Columbia, the 13th day of January, 1872.

JAMES H. EMBRY, ADMINISTRATOR OF ROBERT J. Atkinson, plaintiff,
vs.
JOSEPH W. STANTON, WILLIAM L. PALMER, defendants.
} At law. No. 9216.

The President of the United States to the defendants, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you,

to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in this declaration.

Witness, D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

MERRIMAN.

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

23 (Endorsed:) No. 9216—at law. Embry, adm'r Atkinson, vs. Joseph W. Stanton and William L. Palmer. Issued 13 January, 1872.

Served copies of the declaration, notice to plead, and this summons on both the defendants the 15th day of January, 1872.

A. SHARP, *Marshal.*

Plea.

In the supreme court of the District of Columbia, the 8th day of March, 1872.

EMBRY, ADM'R ATKINSON, *vs.* STANTON AND PALMER. } At law. No. 9216. Defendants' plea.

Now come the defendants, by R. D. Mussey, their attorney, and defend the wrong and injury, when, &c., and pray judgment of the said declaration, because they say that before the filing of the said declaration in this court, viz., on the 8th day of November, A. D. 1871, the said plaintiff, in the superior court for the county of New London, State of Connecticut, impleaded the said defendants and filed his declaration or summons against them, and attached their property to the value of ten thousand dollars in a plea of the case upon and for the not performing the identical promises and undertakings in the said declaration in this suit mentioned, as by a transcript of the original writ in said case, filed herewith, and of this plea made a part, marked Exhibit A, more fully appears.

And the said defendants further say that the parties in this and the former suit are the same, and not other nor different persons, and that the said former suit so brought and prosecuted against the said defendants by the said plaintiff as aforesaid is still depending in the said superior court in the county of New London, State of Connecticut, and this the said defendants are ready to verify; wherefore they pray judgment of the said declaration in this suit, and that the same may be quashed, &c.

J. W. STANTON and
W. L. PALMER,
By R. D. MUSSEY,
Their Attorney.

24 CLERK'S OFFICE, SUP. CT.,
District of Columbia:

R. D. Mussey, attorney for the aforesaid Stanton and Palmer (non-residents), being duly sworn, says that, according to his best knowledge, information, and belief, the above plea is true as to the facts therein stated.

R. D. MUSSEY.

Subscribed and sworn to before me this 8th day of March, A. D. 1872.

R. J. MEIGS,
Clerk Sup. Ct. D. C.,
By CHAS. McNAMEE,
Assistant Clerk.

EXHIBIT A.

To the sheriff of the county of New London, his deputy, or to either constable of the town of Stonington, in said county, greeting:

By authority of the State of Connecticut you are hereby commanded to attach, to the value of ten thousand dollars, the goods or estate of Joseph W. Stanton and W. L. Palmer, of said Stonington, and them summon to appear before the superior court next to be held in Norwich, in and for the county of New London, on the third Tuesday of November, A. D. 1871, then and there to answer unto James H. Embry, of Washington, in the District of Columbia, who is administrator of the estate of Robert J. Atkinson, late of said Washington, deceased, in a plea of the case whereupon the plaintiff declares and says that the defendants were, on the first day of January, A. D. 1871, justly indebted to the said Robert J. Atkinson, then in full life, but since deceased, in the sum of ten thousand dollars for the work and labor, care and diligence, professional services, skill, and attendance of the said Robert J. Atkinson, by the said Robert J. Atkinson before that time done, performed, and bestowed, as the attorney and solicitor of and for said defendants, and upon his retainer in and above the preparation of, prosecuting, trying and presenting divers causes, claims, suits, and business for the defendants before certain departments and accounting officers of the departments in the said city of Washington, and for fees due and of right payable to the said Robert J. Atkinson in respect thereof.

And the said defendants, being so indebted to the said Robert J. Atkinson, undertook and faithfully promised him to pay the said sum of money when they should be thereto afterwards requested; but the defendants, their promise aforesaid not regarding, have never performed the same, but have neglected and refused, and still do neglect and refuse, to pay the said sum of money, or any part thereof, either to the said Robert J. Atkinson in his lifetime, or to the plaintiff, as administrator as aforesaid, since his decease.

And the plaintiff further declares and says that the defendants, the said Stanton and Palmer, had a claim against the Government of the United States for a large sum of money, to wit, for the sum of more than forty-five thousand dollars, for the use, by the said United States Government and the officers and employees thereof, of certain steamboats of the said defendants, and that said claim not being paid, the said defendants employed and retained the said Robert J. Atkinson as their attorney, counsel and solicitor, to prepare, present, and urge the payment of said claim upon and before the proper departments of the United States; and in consideration of the labor and services of the said Atkinson in and about the preparation and prosecution of said claim, the defendants undertook and faithfully promised the said Atkinson to pay to him when said claim should be paid and allowed to them, the said defendants, the sum of five per centum of the gross amount of money so received by them on account of said claim of the said defendants.

And the plaintiff says that, although the said Atkinson, relying upon the promise and undertaking of the defendants, did prepare, present, and prosecute said claim, and though said claim, or a large part thereof, to wit, the sum of forty-five thousand nine hundred and twenty-five dollars and seventeen cents, has been paid to said defendants, yet the defendants, their said promise and undertaking not regarding, have never performed the same, but have neglected and refused, and still do neglect and refuse, to pay said percentage, or any part thereof, to the said Robert J. Atkinson when living, or to the plaintiff, as administrator aforesaid, since his decease; and the said percentage due to the said Atkinson for said services remains wholly due and unpaid, though often requested and demanded.

And the plaintiff further declares and says, that on or about the day of February, A. D. 1865, in consideration that Robert J.
26 Atkinson, then in full life, but since deceased, at the special instance and request of the defendants, did and would prepare, present, and prosecute certain claims of the defendants against the United States before the proper departments and proper accounting officers of the departments of the United States, they, the defendants, undertook and faithfully promised to pay to the said Robert J. Atkinson so much money as he reasonably deserved to have of the defendants when they, the defendants, should be thereunto requested; and the plaintiff avers that the said Robert J. Atkinson, while living, performed the services as requested by the said defendants, and that he, therefore, reasonably deserved to have the sum of ten thousand dollars, of which the defendants afterwards had due notice; yet the defendants, their promise and undertaking aforesaid not regarding, have never performed the same, though often requested and demanded, have never paid said sum, either to said Robert J. Atkinson, in his life, or to the plaintiff as his administrator, since his decease.

All of which is to the damage of the plaintiff, as such administrator, the sum of ten thousand dollars, to recover which, with just costs, this suit is brought.

Hereof fail not, but of this writ, with your doings thereon, lawful service and due return make. George Pratt is recognized in the sum of $100.00 to prosecute in due form of law.

Dated at Norwich, this 8th day of November, A. D. 1871.

LUCIUS BROWN,
Justice of the Peace.

NEW LONDON COUNTY, *ss:*

STONINGTON, *November 9th*, 1871.

Then and there I made service of the within writ by placing a true and attested copy hereof in the hands of each of the within-named defendants.

Attest: J. B. FILLMORE,
Deputy Sheriff.

Travel to serve, &c., $[illegible].20; two copies, 3.00; endorsements, 50; service, 12—$8.82.

27 I, William L. Brewer, clerk of the superior court within and for said county, hereby certify the foregoing to be a true copy of the original writ.

In testimony whereof, I have hereunto set my hand and seal of said court, this 15th day of January, A. D. 1872.

[L. S.] WM. L. BREWER, *Clerk.*

(Endorsed:) Defendants' plea. Filed 8th March, 1872.

Demurrer to plea.

In the supreme court of the District of Columbia, the 9th day of March, 1872.

JAMES H. EMBRY, ADMINISTRATOR, *vs.* STANTON AND PALMER. } At law. No. 9216.

The plaintiff says that the plea of defendants is bad in substance.

LANDER AND MERRIMAN,
Plaintiff's Attorney.

And for cause, plaintiff says that the pendency of a suit in the State of Connecticut is no stay or bar to a suit in the District of Columbia for the same cause of action.

LANDER AND MERRIMAN.

(Endorsed:) Filed 9th March, 1872.

Joinder in demurrer.

Supreme court, District of Columbia.

EMBRY, ADM'R, &C., *vs.* STANTON AND PALMER.

Defendants say that their plea above pleaded is good in substance.

R. D. MUSSEY,
Attorney for Defendant.

SATURDAY, *March* 23, 1872.

Session resumed pursuant to adjournment; McArthur, justice, presiding.

28 JAMES H. EMBRY, ADM'R OF ROBERT J. Atkinson, plaintiff, *vs.* JOSEPH M. STANTON AND WILLIAM L. PALMER. } At law. No. 9216.

Upon argument of plaintiff's demurrer to defendants' plea, it is considered that said demurrer be, and the same is hereby, sustained, and defendants are allowed twenty days in which to plead.

Amendment to plea.

In the supreme court of the District of Columbia, the 13th day of April, 1872.

EMBRY, ADMINISTRATOR, *vs.* STANTON AND PALMER. } At law. No. 9216.

Now come the defendants in the above entitled cause, and pursuant to the leave granted them by the court on the day of , A. D.

1872, and now for then file this amendment to their plea in said case heretofore filed, to wit, after the words "superior court of the county of New London, State of Connecticut," in lines 8, 9, and 10, first page of said plea, insert "the said court being a court of general jurisdiction, and competent to try and determine the suit against the defendants by said plaintiff hereinafter referred to."

R. D. MUSSEY,
Defendants' Attorney.

(Endorsed:) Filed April 13, 1872.

Joinder of issue.

In the supreme court of the District of Columbia, this 25th day of May, 1872.

EMBRY, ADM'R, *vs.* STANTON AND PALMER. } At law. No. 9216.

Plaintiff joins issue upon the defendants' plea.

LANDER AND MERRIMAN,
Attorney for Plaintiff.

(Endorsed:) Filed 25 May, 1872.

29 *Note of issue.*

In supreme court, D. C., May 25, 1872.

JAMES H. EMBRY, ADM'R OF ESTATE OF ROBERT J. ATKINSON, *vs.* STANTON AND PALMER. } At law. No. 9216.

Last pleading filed May 25, 1872.

LANDER AND MERRIMAN,
Plaintiff's Attorney.

R. D. MUSSEY,
Defendants' Attorney.

(Endorsed:) Filed 25 May, 1872.

WEDNESDAY, *March* 12, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

JAMES H. EMBRY, ADM'R OF ROBERT J. ATKINSON, deceased, plaintiff, *vs.* JOSEPH W. STANTON AND WILLIAM L. PALMER, defendants. } At law. No. 9216.

And now comes the plaintiff, by his attorneys, Mess. Lander and Merriman, as well as the defendants, by their attorney, Mr. Mussey, and a jury of good and lawful men of this District, to wit, John Van Riswick, Michael Duffey, Columbus Alexander, Henry Coburn, Geo.

Becker, James R. Harrover, Robert A. Griffin, Robert Tolefarro, Charles Kloman, Columbus O. Wall, Daniel W. Bills, and James M. Terrell, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

THURSDAY, *March 13th*, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

JAMES H. EMBRY, AD'R OF ROBERT J. ATKINSON, dec'd, pl'ff,
v.
JOSEPH W. STANTON AND WILLIAM L. PALMER, def'ts.
} At law. No. 9216.

And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say: they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendants, by reason of the premises, is the sum of nine thousand one hundred eighty-five dollars and eighteen cents, beside costs. And thereupon the defendants, by their attorney, move the court for a new trial upon the exceptions taken at the trial.

Motion for a new trial on exceptions.

In the supreme court of the District of Columbia, 13th day of March, 1873.

EMBRY, ADM'R,
v.
STANTON AND PALMER.

The defendants move the court for a new trial upon the exceptions taken.

R. D. MUSSEY,
For Def'ts.

(Endorsed:) Filed March 13, 1873.

Motion for a new trial for reasons.

In the supreme court of the District of Columbia, the 17th day March, 1873.

JAMES H. EMBRY, ADM'R OF ROBERT J. ATKINSON,
vs.
JOSEPH W. STANTON AND WM. L. PALMER.
} Motion for a new trial. At law. No. 9216.

The defendants move the court for a new trial upon the following grounds, viz:

1st. That the damages found by the jury are excessive.

3d. That since the trial evidence vital to the case has been discovered.

R. D. MUSSEY,
For Def'ts.

(Endorsed:) Filed March 17, 1873.

MONDAY, *March* 17, 1873.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

JAMES H. EMBRY, ADM'R OF ROBERT J. ATKINSON, pl'ff,
vs.
JOSEPH W. STANTON AND WM. L. PALMER, def'ts.
} At law. No. 9216.

31 And now again come the defendants, by their said attorney, and move the court for a new trial upon the followings grounds, viz:

1st. That the damages found by the jury are excessive.

2nd. That since the trial evidence vital to the case has been discovered.

SATURDAY, *April* 19, 1873.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

JAMES H EMBRY, ADM'R OF ROBERT J. ATKINSON, deceased, plaintiff,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defendant.
} At law. No. 9216.

Upon argument of the defendants' motion for a new trial, it is considered that the same be and is hereby overruled and refused; and thereupon the defendants pray an appeal to the general term.

Bill of exceptions.

Supreme court of the District of Columbia.

EMBRY, ADM'R,
vs.
STANTON AND PALMER.
} Defendants' bill of exceptions. At law. No. 9216.

At the trial of this cause upon issue joined, the plaintiff offered evidence tending to prove that he was the administrator of the estate of Bobert J. Atkinson, deceased, who died February 25, 1871.

That defendants were owners of certain steamers which were used by the United States Government during the war of the rebellion, at New Orleans, La., and for which use they claim compensation to the amount of forty-five thousand nine hundred and twenty-five $\frac{7}{100}$ dollars.

That said Atkinson was at one time Third Auditor of the Treasury.

That Judge William Johnson had charge of this claim of defendants, with others of a similar nature, until obliged to give it up on account of an appointment upon the commission to revise the laws of the United States, when, at the request of defendant Stanton, Atkinson was employed to continue the prosecution of said claims, and had full charge thereof.

32 That Mr. John Jolliffe was at one time employed with Johnston and Atkinson in and about the defendants' steamboat claims, and it was then agreed that the fees resulting from the payment of the

claims allowed should be divided among the three, Johnston, Jolliffe, and Atkinson; but that Jolliffe rendered no service in respect to this particular claim.

That Atkinson continued alone in the prosecution of this claim up to the time of his death, which occurred after the claim was allowed by the accounting officers of the Treasury Department and settlement made, but before the warrant therefore issued, which was on the 7th of March, 1871.

That Atkinson's services were rendered upon a contingent remuneration; that there was no contract as to the amount of compensation to be paid; that attorneys who prosecute steamboat claims before the departments usually charge contingent fees of from 20 to 25 %, which the plaintiff's witness regarded as a reasonable charge. That the amount awarded and paid to the defendant in this case $45,925 $\frac{41}{100}$.

That Atkinson was an accurate, faithful, professional gentleman, who knew the rules of the Treasury Department well, and who rendered services in and about this case by preparing and filing printed briefs, and that he was the sole attorney in the case and alone interested in the pay.

That the defendant Palmer said in the Second Comptroller's office, when trying to have the draft issued to him instead of to Atkinson, the attorney, that Atkinson should not be wronged of his fee if the draft were sent direct to defendant.

That the said settlement for $45,925 $\frac{41}{100}$ was made in January, 1870, by the Second Comptroller, but the issuing of the warrant was suspended by the Secretary of the Treasury, on account of the supposed want of jurisdiction, by reason of the act of February 19th, 1867, and the amendatory act of December 23, 1869; and that the warrant did not issue until another amendatory act was passed March 3, 1871, and that the warrant and draft issued March 7, 1871; and that the draft was received by the defendants, and was paid by the United States Treasurer to the order of defendants.

33 That one of the defendants wrote to Atkinson urging him to labor before the committee of Congress towards the enactment of said act of March 3, 1871.

And thereupon the plaintiff rested.

Whereupon the defendants gave evidence tending to show—

That the plaintiff's intestate was the successor, in prosecuting defendants' claims, of Judge Johnston, and of Judge Johnston, Mr. Jolliffe, and Mr. Atkinson; that the compensation was to be contingent upon success.

That while the claims of the defendants were being prosecuted by the predecessors of the plaintiff's intestate, said predecessors gave defendants the following receipts, viz:

Received, Washington, February 18, 1875, from J. W. Stanton & Co. fifteen hundred dollars, being for fees as solicitor in the claim before 3d Auditor of the Treasury in claim for loss of steamer Anglo-American. The amount received to-day has been taken under protest, and the same fees are to be paid upon any further amount collected.

$1,500. WILLIAM JOHNSON.

And,

Received, Washington, 29th March, 1866, of Messrs. J. W. Stanton & Co., six hundred and two $\frac{67}{100}$ dollars, being for attorney's fees in con-

nection with their claim against the Government of the United States for repairs, &c., of steamers Anglo-American and St. Charles.

WILLIAM JOHNSTON.
R. J. ATKINSON.
JOHN JOLLIFFE.

$602.67.

[Int. rev. stamp cancelled.]

That said sums of $1,500 and $602.67, respectively, were 5% of the amounts recovered by virtue of the said services in said receipts named.

That at the time of the plaintiff's intestate undertook the said claim of defendants, the accounting officers of the Treasury held the claims of the nature of the one now in controversy were barred by the act
34 of Congress of July 4, 1864, and that the said officers held that the act of Congress of February 19, 1867, still further barred such claims, and that the acts of December 20, 1869, and of March 3, 1871, were required to remove that bar, which said several acts were offered in evidence. (See 13 St, p. 381; 14 St., p. 397; 16 St., p. 368; 16 St., p. 600.)

That the plaintiff's intestate did nothing to bring about the passage of these acts; that the warrant for the payment of defendants' claim was not issued nor the money paid until after March 3, 1871.

That this cause of action was the same as that of the suit brought in Connecticut and heretofore pleaded in abatement.

That said Connecticut suit was instituted by plaintiff's orders and pursuant to his instructions.

That the statement of the services of the defendants' boats was made up before it was sent from the Quartermaster-General's Office to the Treasury Department prior to Atkinson's employment.

And thereupon the defendant rested.

And thereupon the defendants prayed the court to instruct the jury as follows:

1ST PRAYER.—If the jury shall find from the evidence that the plaintiff's decedent was engaged by the defendants to prosecute for a contingent compensation the allowance by an executive department as the United States Government of a claim against the United States, then the contract was inhibited by law, and the plaintiff cannot recover this case.

2D PRAYER.—If the jury shall find from the evidence that the plaintiff's decedent undertook to procure the payments to the defendants of a certain claim for a compensation to be contingent upon the success of his efforts, then the plaintiff cannot recover, unless it shall have been proven to the jury that the labors of said decedent in behalf of the defendants were continued up to the time when payment in fact was made.

3D PRAYER.—If the jury shall find from the evidence that the plaintiff's decedent was employed by the defendants to procure the payment of a claim against the United States, the payment of which was prohibited by law when he undertook the case, the plaintiff cannot recover, unless he have shown that his decedent either procured or labored to procure such modification of the law as would remove the bar to the payment of said claim.

35 4TH PRAYER.—That the evidence of attorneys or claim agents tending to show what is ordinarily charged for "steamboat claims"

is to be disregarded. Any attorney or claim agent who knows the actual amount of work that was performed by plaintiff's decedent in the prosecution of this claim, and who is familiar with the price usually charged for such work, may testify what, in his opinion, such work was worth; but testimony of what attorneys or claim agents generally charge for cases where steamboats have been seized is not to be regarded by you as a basis of estimating what the services of plaintiff's decedent were worth.

5TH PRAYER.—If the jury shall find that the plaintiff is entitled to recover, and shall further find from the evidence that the series of defendants' claims, of which this is one, was undertaken and several of them prosecuted by Judge Johnston, at a compensation of 5 per cent. on the amount recovered; and further, that in consequence of a legal disability to prosecute them further the said Johnston turned over said claims to the plaintiff's decedent for prosecution; then, in the absence of proof to the contrary, the jury may infer that the same rate of compensation obtained between Judge Johnston's successor and the defendant, as obtained between them and Judge Johnston.

Which prayers, and every of them, the court overruled, and which instructions, and all of them, the court refused to give the jury; and thereupon the court proceeded to charge the jury as follows, viz:

Charge.

GENTLEMEN OF THE JURY: 1. Mr. Embry, as administrator of Atkinson, deceased, brings his suit against Stanton and Palmer, the defendants, to recover what he alleges to be due his intestate for professional services rendered to the defendants in the lifetime of the intestate.

2. He appeals to you, in the forms of law, to give the plaintiff, for his services, what is right in view of the professional labor that he has rendered.

3. This claim is met with a prayer, first, that although you shall
36 find from the testimony that he was employed as attorney, and as such he did mingle his labor and professional skill in the procurement of the claim of the defendants, notwithstanding he cannot recover because the service is against the law, under the prohibition of the law, which in this class of cases does not permit of recompense. Now, there is a class of cases which are obnoxious to the law. Where an attorney or non-professional agent enters into an engagement to exercise his personal influence or the influence of his position, his official position, with an officer of the law to superinduce judgment in behalf of his client, the employment is pronounced by the law to be vicious, against public policy, against the integrity of government, and he cannot receive the reward.

Distinguished from this class of cases, however, is the case where a man in the exercise of his ordinary labor and calling, and with the instrumentalities of his professional learning and industry, undertakes to work out a desired result for his client, not through personal influence, but through the instrumentalities of the law, by persuasion as distinguished from influence. He may be paid. There is no more reason for holding this class of labor under the interdict of the law than any other class of labor.

In the construction of our government and in the relation of our citizens to it, in dealing with it and its departments, there is frequently and necessarily required a degree of knowledge and skill and acquaintance with forms and principles that is not possessed by the unlettered citizen,

before he can obtain that which is justly his due; and when the labor is exercised by the class of persons who do possess that knowledge, and in that way, as attorneys, there is no more reason in defeating them of their pay than there is the mechanic of his pay for labor done by him.

If you find that the employment of Mr. Atkinson was the employment of a professional man in the ways of his profession, and was not the employment of a man to exercise and wield an undue influence over the administrative officers of the government; if you shall find that he was so engaged by the defendants, you may find for him notwithstanding the instruction asked in the first prayer of defendants, which is overruled.

37 4. And you may find for him what he ought to receive in the absence of any proof of a special agreement as to his reward.

5. There has been some intimation that the undertaking was by special agreement, at the rate of five per cent. as contingent compensation, and the defendants' counsel appeals to you that there is proof of such a contract; that the predecessor of Atkinson, in the prosecution of defendants' claims, had received five per cent. compensation on the amounts recovered by him. You had before you the testimony in that regard as pointing to that compensation. You have heard the testimony of others as to rates of compensation in such cases. You have the right to take into consideration the fact of the allowance made theretofore under the circumstances under which it was made as guiding your judgment to a conclusion. If that is satisfactory, that there was a contract, you will hold the parties to the limitations of that contract; but it must be proved. The law presumes that when one enters upon labor for another, in the absence of any special agreement for reward, that he is entitled to and shall receive such reward as his labor is worth. The law makes the contract that he shall receive a reasonable compensation therefor. In the absence of any special agreement between these parties, the law steps in and makes the agreement for them. If you find that any special agreement was made, your verdict must be limited to the amount of that agreement.

6. The court has permitted to be given in evidence here the character of this claim, the character of the professional services rendered in its prosecution, the character of the intestate for ability to perform those services, his honesty and skill, and in addition to the customary reward for this description of services. It is objected here by counsel for defendants that this last is the custom of others in similar cases, should not be considered by you, and should not govern the subject. It should not alone govern the subject, but is proper to be resorted to with a view of obtaining what the intestate's compensation should be.

7. The ground for paying a large per cent. in contingent cases
38 is, that the fees for services must bear relation to, and take color from, the services performed. If a man is to spend his time, labor and learning in the direction of a given result, to be paid if that result is accomplished, and nothing unless it is, the custom of the profession is as testified to by these gentlemen. You have listened to it. The intendment of reason, too, attaches, that the reward shall correspond to the risk of getting nothing in the case of failure. This testimony is not final, but it constitutes an element in determining the amount due the plaintiff. These remarks, with one exception, cover the entire case.

8. It is urged here that without you find that the labor of the intestate continued to the period of satisfaction of this claim by the Govern-

ment, you will not render a verdict for the plaintiff. This paper is predicated on the fact before the ultimate payment; Atkinson was seized with mental disease, and shortly before became insane and incapable of discharging professional service. It is therefore reasoned that he is not entitled to recover because his claim predicated on the contingency of realization, and because he was overtaken with sickness before his clients were overtaken with justice. This would be an unjust conclusion to come to. The spirit of this contract is that he will mingle his labor and intellect with those of the accounting officers, with a view to superinduce the result his clients wished; and if you find that it was through his labor and industry, or enlightenment (for his office was simply to enlighten the judgment of the gentlemen in charge of the claim) that the claim was satisfied, and not through those of other agents—that the fruit of the claim grew out of his labor—you will find that he is entitled to his pay, notwithstanding he died a day or two before the claim was paid. This is the Christianity of this case, and I inform you it is also the law of this case.

9. The defendants ask me to instruct you that because the law did not furnish an equitable blanket wide enough to cover them, and auxiliary legislation was rendered necessary to work out justice, that that fact that legislation was necessary to the consummation of payment, that that intervention should defeat the plaintiff. Now the court does
39 not understand the case in this light, although the testimony seems to carry this man before committees of Congress as well as before Departments. But even if it did not, the fact that such legislation was necessary don't defeat his right. His clients assumed to have a claim against the Government and employed him to prosecute it, and if informality or technicality rendered legislation necessary, it was only in aid of his services, and not to supersede them. That prayer is overruled.

10. In reference to the amount of your recovery, you should be reasonable in this case, as in all others. The profession of law is an honorable one—an enlightened one; but it has its excesses, and its professors are liable to run into these excesses. You are to be regulated here by the same solid, substantial considerations of justice that you exercise with reference to any other claim.

11. You have heard the testimony of these gentlemen who prosecute this kind of claims, and they state the contingent compensation ranges from 10 to 25 per cent., in the absence of special contract, and you will find that amount on which your consciences rest the easiest.

12. I believe this disposes of all the defendants' prayers, which, except as modified in this charge, are overruled. Take the case and do what is right.

To which overruling of said prayers, and to which refusals, and to each of them, the defendants, by their counsel, except before giving of the verdict (and the said Chief Justice noted the same upon his minutes).

And to the said charge of the said Chief Justice, in so far as it substituted instructions for those prayed for, and especially to the paragraphs thereof numbered 3, 5, 6, 7, 8, 9, 11, and to each of them, the defendants, by their counsel, excepted before the giving of the verdict (and the said Chief Justice noted the same upon his minutes).

And the said jury thereupon gave their verdict against the defendants.

And the said defendants, by their counsel, request the said Chief Justice to put his seal to this their bill of exceptions, containing the

several matters given in evidence to the jury and the several prayers offered by the defendants, and their overruling by the said Chief
40 Justice, and the said several instructions and charge to the jury; and the said chief justice (now for then) puts his seal hereto the 3d day of May, 1873.

[L. S.] D. K. CARTTER,
Chief Justice.

(Endorsed:) Filed Aug. 13, 1874, nunc pro tunc.
Rec. 159—2.

MONDAY, *September* 29, 1873.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin, Wylie, and Humphreys.

JAMES H. EMBRY, ADMR. OF ROBERT J. ATKINSON, pl'ff,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, def'ts. } At law. No. 9216.

Argued by Mr. Merriman for plaintiff, and by Mr. Mussey for defendants, and submitted to court.

MONDAY, *October* 27, 1873.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Wylie and Humphreys.

JAMES H. EMBRY, ADMR. OF ROBERT J. ATKINSON, pl'ff.,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, def'ts. } At law. No. 9216.

And now again come here as well the plaintiff as the defendants, by their respective attorneys; and because it appears to the court that there is not in the record or judgment of the circuit court any error, therefore it is considered that the said judgment be and the same is hereby affirmed; and the defendants, who appealed to this court from the judgment of the circuit court, pay the costs of the cause in this court, to be taxed by the clerk.

Proceedings before the supreme court of the District of Columbia, in general term, commencing on the fourth Monday, 28th day of September, 1874. Present, Chief Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

41 JAMES H. EMBRY, ADMR. OF ROBERT J. Atkinson, pl'ff,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, def'ts. } At law. No. 9216.

On motion of the plaintiff, by his attorney, Mr. Hornor, it appearing to the court that the judgment of affirmance entered in this case on the 27th of October, 1873 (ante, page 264), should have been a judgment on the verdict in the circuit court, on which verdict the circuit

rendered no judgment, it is ordered that said entry be stricken out, and the proper judgment entered now for then.

JAMES H. EMBRY, ADMR. OF ROBERT J. ATKINSON, pl'ff,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER defendants.
At law. No. 9216.

And now come here as well the plaintiffs as the defendants, by their attorneys, respectively; and because it appears to the court that there is not in the record and proceedings of the circuit court any error, therefore it is considered that the plaintiff recover against the defendants the sum of nine thousand one hundred and eighty-five dollars and eighteen cents, in manner and form aforesaid found, with interest thereon, from the 13th day of March, 1873, and the further sum of $ for his costs of suit, and have execution thereof.

Clerk's certificate.—Authentication of record.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

42 Witness my hand and the seal of said court, this 2d day of October, 1874.

[L. S.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Assistant Clerk.

(Clerk's fees for transcript, $18.00.)

The above judgment was affirmed by the Supreme Court of the U. S. upon writ of error brought thereto by Messrs. Stanton and Palmer.

At a superior court held at New London, within and for the county of New London, on the second Tuesday of September, A. D. 1878.

Present, Hon. John D. Park, judge; Webster Park, clerk; Nathan D. Bates, sheriff.

Joseph W. Stanton and William L. Palmer, both of the town of Stonington, in said New London County, petitioners, vs. James H. Embry, of Washington, in the District of Columbia, administrator of the estate of R. J. Atkinson, late of said Washington, deceased, respondent, as by petition on file, dated the 18th day of October, A. D. 1877.

This petition was brought to the November term of this court, 1877, when the parties appeared and were heard on a demurrer filed by said respondent; and the court, having heard the parties, reserved the questions of law arising thereon, for the advice of the supreme court of errors, at the March term, 1878, and by legal continuance this petition came to the June term, 1878, when, the supreme court having so advised, this court found the petition sufficient, and appointed the Hon. Origen S. Seymour a committee in said case; and again by legal continuance

said petition comes to this present term, and now the said committee made his report which was accepted by this court, and what decree should be passed is reserved for the advice of the supreme court of errors, at the next term, to be held at Norwich, within and for the second judicial district, on the first Tuesday of March, A. D. 1879.

Attest:

WEBSTER PARK, *Clerk.*

A correct copy of record of the supreme court of errors.

Attest:

WEBSTER PARK, *Clerk.*

43 Supreme court of errors, second judicial district, New London County, September term, A. D. 1879.

J. W. STANTON AND W. L. PALMER
vs.
JAMES H. EMBRY, ADM'R.

Superior court, New London County, June term, A. D. 1879.

(The first ten pages of the record in this case, containing the petition, citation, order of notice, officers' returns and the respondent's demurrer, upon which the case was reserved for this court, were printed in the docket of this court at the March term, 1878.

The next thirty-two pages of the record, containing the respondent's answer, committee's report, and the exhibit attached to committee's report, were printed in the docket of this court at the March term, 1879.

The remainder of the record in this case here follows:)

Decree.

STATE OF CONNECTICUT:

Superior court, New London County, June term, A. D. 1879.

Upon the petition of Joseph W. Stanton and William L. Palmer, both of Stonington, in said county, showing to this court—

First. That said petitioners were residents and citizens of Louisiana for many years prior to the late rebellion; but when that became flagrant, they resumed in 1861 their old residence and citizenship in this state.

Second. That whilst residents of Louisiana they transacted a large towing business, and had several valuable steam tug-boats en-

44 gaged therein, which on the restoration of the national authority were seized by officers of the national government and used, abused, and lost by them, so that four distinct claims arose against the United States in favor of your petitioners, as follows:

A. For the loss of steamer Anglo American, which was entrusted to William Johnston, a counsellor at law, and collected on a fee of five per cent., said claim amounting to $30,000.

B. For repairs, &c., to steamers Anglo American and St. Charles, entrusted to said William Johnston, R. J. Atkinson, and John Joliffe, all three counsellors at law, who collected the same March 29th, 1866, and charged five per cent. per agreement on the collection for their services, said claim amounting to $12,053.45.

C. For services of steamer St. Charles, collected in 7 30's United States bonds by R. J. Atkinson, who deducted therefrom five per cent. in bonds and remitted the remainder. Out of the deduction he was entitled to one-half for his services, viz, $1,534.46, said claim amounting to $61,371.92, and collected by him on the 29th of April, 1865.

D. The last claim was for services of steamers Anglo American and St. Charles, amounting to $45,925.91, which was collected by said William L. Palmer about the 10th day of March, 1871.

Third. And further showing that after the collection of the above named claim C there remained in the hands of said Atkinson the sum of $1,534.46 due to the petitioners; and after the collection of the above claim D the petitioners were bound to pay, by special written agreement with said Atkinson a fee of five per cent. on the amount collected, viz, on $45,925.91, which amounts to $2,297.29, deducting what the said Atkinson owed to the petitioners from the amount by them to him, throwing aside and giving to said Atkinson the benefit of interest to date, and there remained due to him on March 7th, 1871, the
45 sum of $761.83, and no more. With interest, the amount due said Atkinson was less than $300.00.

Fourth. And further showing that said Atkinson died February 25th, 1871, and the warrant for said $15,925.91 issued March 7th, 1871; and James H. Embry, a resident of the District of Columbia, was duly appointed administrator of the estate of said deceased, by the honorable supreme court of said District sitting in probate matters, and accepted said trust, and was duly qualified as such administrator; that all the books and papers of said Atkinson went into the custody and control of his said administrator, who before September 23d, 1871, sent the claim of said Atkinson for his professional services in prosecuting the petitioners' said claim D to George Pratt, esq., counsellor at law, residing in said Norwich, and specifying in his bill of particulars a full statement of said claim in words and figures as follows:

J. W. Stanton and W. L. Palmer to estate of R. J. Atkinson, deceased, Dr.

To amount due for professional services of R. J. Atkinson, in prosecution of claim against the United States, for services of the steamer "Anglo American" from May 22d to July 28th, 1862, and for services of steamer "St. Charles" from April 27th to July 28th, 1862, being five per cent. of amount allowed by the United States:

Amount allowed by the United States	$45,925 17
Amount due estate	2,296 25

All of which was in conformity to the written agreement between said Atkinson and the petitioners, and to the books of account and papers of said Atkinson in the hands of this said administrator, and that this statement was made by said administrator and forwarded to his attorney, said Pratt, at the request of the petitioners, or one of them. Upon the receipt of this paper from said Pratt, on or about the 25th of
46 September, 1871, the petitioner, Stanton, replied to said Pratt, admitting the five per cent. claimed, but averring that the commissions were paid by the appropriation of other monies, as hereinbefore stated, and offering to submit the matter to arbitration. But this reply being unsatisfactory, a suit was commenced by said Embry, as administrator of said Atkinson, against the petitioners, to recover the amount above stated, viz, $2,296.25, returnable to the term of this court held at Norwich, in and for said county, on the third Tuesday of November, 1871. Said writ was withdrawn at the March term of this court, 1872.

Fifth. And further showing, that on the 13th day of January, 1872, said Embry, administrator as aforesaid, entered another suit against the petitioners on the law side of the honorable supreme court of the District of Columbia, and served process thereon on the petitioners January 15th, 1872, but instead of claiming the five per cent. on the amount collected, in conformity to said written agreement, and the books and papers of said Atkinson, and his own bill of particulars served upon the petitioners by his attorney, Pratt, as aforesaid, demanded ten thousand dollars on a quantum meruit, and after a verdict, judgment, and writ of error to the Supreme Court of the United States, he has succeeded in obtaining an execution against the petitioners for the sum of $9,185.18, with interest from March 13th, 1873, and all costs of suit; he, said Embry, well knowing that when said verdict and judgment were rendered his decedent was only entitled to five per cent. on the amount collected, viz, $2,296.25, and this on a special agreement between said decedent and the petitioners contained in the letters of said decedent, copies of which were before him.

Sixth. And further, showing that one of them, said Palmer, at the time of said trial before the jury, was absent from the District of Columbia, and though telegraphed to, was unable to reach Washington, the place of the trial, in time to be present thereat, it being impossible to tell in advance, with any certainty, what day any case will come on, and the notifica-
47 tion by telegraph was too short. The other petitioner, said Stanton, was lying sick in bed at the Kirkwood House, in said Washington, and unable to attend said trial. That he endeavored to procure a postponement of said trial, but without success. That since the trial and disposal of said case at the general term of said court, the said Stanton has re-examined the masses of papers connected with the business of the petitioner's boats at New Orleans, Louisiana, and which were stored for safe keeping at his domicile in this State, and has then and there found two letters from said Atkinson, one dated Washington, Feb. 18th, 1870, and one dated May 7th, 1870, directed to said J. W. Stanton, at Stonington, Connecticut, and agreeing, stipulating, and contracting that the fees in this business, meaning the claim D above set forth, stated to be five per cent., was "entirely satisfactory," as by said letters ready in court to be shown will fully appear. And further showing that said J. W. Stanton, the managing partner and active partner of the old firm of Stanton & Palmer, had long retired from business when said suit was brought. That he was advanced in years. That he had not been in the habit, after leaving off active business, of classifying or indexing his letters. That for several years prior to the commencement of this suit, and after it had been commenced, his mind had been greatly depressed by domestic bereavement caused by the long and painful sickness of his wife, and his mental anxiety and grief at her death wholly unfitted him for business and seriously impaired his bodily health. That after the commencement of said suit he made search for all letters and papers in his possession relating to the business of said boats, and his correspondence with said Atkinson in relation to the collection of said claims, and all matters relating thereto, and placed all such papers as he could find into the hands of his counsel in said suit, and he then supposed that he had found and placed in the hands of said counsel all of said papers. That upon the discovery of said letters, he immediately placed the same in the hands of his counsel, but too late for use in the court below, said suit having then been appealed to the Supreme Court of the United States.

48 Seventh. And further showing that said suit at law was brought to recover against the petitioners on a quantum meruit, and ver-

dict and judgment were rendered thereon for $9,185.18, with interest from March 13th, 1873, when to the knowledge of said Atkinson, whilst living, and, as the petitioners aver, to the knowledge of said Embry, as his administrator, the true amount due to said Atkinson for his services when the amount was received by the petitioners from the United States was but $2,296.25, on a special contract and agreement for that amount when the money was recovered, as set forth. And averring, that said Embry, administrator as aforesaid, in withdrawing his said suit and bill of particulars from this court, and instituting said suit in the supreme court in said District of Columbia, with his knowledge of the facts in the case and the actual fee agreed upon between the petitioners and said Atkinson for his services in relation to said claim D, is estopped in equity from claiming and recovering more than that sum from your petitioners, and from taking advantage of the temporary defects in your petitioners' proofs. That his said judgment at law was obtained by the suggestio falsi that he was entitled to a quantum meruit, and not to a stipulated fee of five per cent. on the amount collected.

Eighth. And further showing that said Embry, as such administrator, has commenced an action of debt against them on said judgment to recover the amount thereof, with interest and costs, which suit was returnable to the term of this court held at New London, in and for said county, on the second Tuesday of September, 1877, which was duly served upon the petitioners, and was returned to and entered in the docket of said court. That at said term the said Embry appeared by Daniel Chadwick, esq., of Lyme, in said county, his attorney, and moved said court for a judgment against the defendants in said action. That the petitioners appeared by Hon. L. F. S. Foster and J. Halsey, esq., their attorneys, who informed said court that the petitioners had an equitable defence against the enforcement of said judgment at law, and prayed said court that said cause might be continued to the term
49 thereof to be held at Norwich on the first Tuesday of November next, in order that the petitioners might be enabled to file their petition in said court, praying for equitable relief and an injunction against the further prosecution of said suit, which motion was allowed by said court, and said cause was ordered to be continued accordingly.

Ninth. And further showing that they have no adequate remedy at law to protect themselves against this unconscientious judgment, but must be subjected to the payment of the same, and be forever deprived of their just rights in the premises, unless relieved by the equitable powers of this honorable court. That the said judgment was obtained by wrong, and a hard conscience awards the administrator four times the amount of his decedent's written contract, works the petitioners an irreparable injury if enforced; and said administrator, the plaintiff in said suit, should be perpetually enjoined by this court from prosecuting the same and from in any manner enforcing said judgment against the petitioners upon the payment by them of said agreed sum of five per cent. upon the amount collected, viz, $2,296.25, which is more than he is actually entitled to, for the reasons hereinbefore set forth in paragraph third, and which amount the petitioners hereby tender and offer to pay to said Embry, as such administrator, in full for all just indebtedness on their part to the estate of said decedent, Atkinson.

And praying that said respondent may be perpetually restrained and enjoined from the further prosecution of said suit upon said judgment recovered by him against the petitioners in the supreme court of the District of Columbia, and from executing or in any manner enforcing said

judgment against the petitioners, as soon as the petitioners have paid to said respondent the amount which may be found due, if any, to the respondent, on a final decree in this suit, and praying for other and further relief, as per petition on file, dated the 18th day of October, A. D. 1877, fully appears.

Said petition was brought to the term of this court held at Nor-
50 wich, within and for said county, on the first Tuesday of November, A. D. 1877, and was duly served upon the said Embry, in pursuance of the order of notice made in said cause, and was returned to and entered in the docket of said court. At said term the petitioners appeared by Hon. L. F. S. Foster and J. Halsey, esq., their attorneys, and the respondent appeared by Hon. Daniel Chadwick, his attorney, and were at issue upon a demurrer to said petition as on file.

Said court having heard said parties, reserved the questions of law arising thereon for the advice of the supreme court of errors, held at Norwich, within and for the second judicial district, on the first Tuesday of March, A. D. 1878. And said petition, by legal continuances, came to said March term. At said March term said court overruled said demurrer, in accordance with the advice of said supreme court of errors, and thereupon the said respondent filed his answer to said petition, therein setting forth—

That he admits the residence of petitioners as stated; that he has no knowledge of the matters set forth in the second paragraph of said bill, except as appears from the correspondence, books, and papers of said decedent Atkinson in his possession. A full and complete copy of all entries from said books, so far as relates to the business of the petitioners, is hereto annexed, marked A.

And further stating, in explanation of said claims identified in said petition as C and D, both being for services of the same vessels, that claim C was for such services after the 28th day of July, 1862, when petitioners' right to the ownership thereof was fully established, which claim was paid in May, 1865, and within a few months after the said Atkinson took charge of said cases; and claim D was for services of said vessels prior to said date, and involved various and complicated questions of law and fact, and was not settled and paid until March, 1871. That in addition to the three claims named by petitioners as B, C, and D, said Atkinson was employed by petitioners in the claim for coal, etc., taken by the United States from the petitioners, in which claim the said Atkinson rendered professional services from the said month of

February, 1865, until his death, and for which services, although
51 such claim has been paid to petitioners, as respondent is advised, no fee or compensation has been paid to said Atkinson, or to respondent as administrator thereof.

It appears from the books of said Atkinson that the total amount collected by the petitioners in the several casess marked B, C, and D, was nearly $12,000, exclusive of the coal claim, and adding the amount in the coal case the aggregate is about $14,000; and for all his services in said several cases Atkinson has received only about $3,300.

Respondent denies, upon information and belief, that there remained in the hands of said Atkinson after the collection of claim C the sum of $1,543.48, or any other sum, but that on the other hand there was a small balance due the said Atkinson on account of that transaction, as appears from the statement A hereto attached.

Respondent denies, upon information, any special written agreement between said Atkinson and the petitioners as to fees in the matter of claim D.

Respondent admits that said Atkinson died February 25th, 1871, and that said Atkinson left surviving him a widow and six children, all of whom except one, as respondent recollects, were then minors.

Respondent also admits that the warrant or draft for said $45,925.91 (claim D) was delivered to said Palmer, as stated, but by law, as well as by the custom of the department, the said Atkinson had a lien on the same for his fees, and that the Second Comptroller gave the order for the delivery of such draft to said Palmer only upon his assurance and promise, supported by Senator Anthony and Mr. Dixon, that said Atkinson's fees should be promptly paid.

Respondent admits his appointment, acceptance, and qualification as administrator of said estate, as stated; also, that he came into possession of said decedent's books and papers.

Respondent also admits that he placed said claim into George Pratt's hands for collecting, and upon being requested made a statement of account as stated; but before doing so respondent wrote several
52 letters addressed to petitioners, or one of them, and receiving no reply wrote to Senator Buckingham, and in reply to the last letter received the letter hereto attached, marked B, and on the same day received a letter from said Stanton, hereto attached, marked C, denying any indebtedness to said decedent Atkinson, and referring to Samuel Churchman for proof thereof.

Respondent denies that said account so sent to said Pratt was made out from, or in conformity with, any written agreement between the said parties, but that such account was so made out and presented for the reason that the books of said Atkinson showed that he had in other cases charged five per cent. Respondent not then taking into consideration the fact of the great difference in the labor and time expended in the several cases; and in order to effect a settlement of the matter without litigation, and in the absence, as respondent believed, of any agreed fee, he was willing to receive five per cent. fees in settlement of such claims, for the said estate could not well afford the expense of a litigation in the matter, especially in a distant State.

And further saying, that said Atkinson preserved no copies of the letters referred to in said petition of February 18th, 1870, and of May 7th, 1870, or of any letters written in said year of 1870 to the petitioners, or either of them, relating to fees, except that there appears among his papers a paper purporting to be a letter dated February 13th, 1870, but not copied in the letter-book, in which there is a reference only to the disputed question of fees on claim C, collected in the year 1865.

Respondent, however, claims that the petitioners are estopped from claiming or setting up, at this late day, any contract or agreement alleged to have been made or acknowledged by the letters referred to in said petition, for the reason, among others, that issues were made on the trial at law, hereinafter set forth, whether there was any contract between said Atkinson and said petitioners, and, if so, what? and that all such issues were fully and finally determined and adjusted by the trial, verdict, and judgment of the supreme court of the District of Columbia, and affirmed by the Supreme Court of the United States, as hereinafter more fully stated, which court had full and complete jurisdiction of cause and issues so made and tried.

53 Respondent admits, that through his said attorney, he brought suit in this court for the purpose of recovering for such professional services, but that in his declaration in said suit he claimed for such services of the petitioners the sum of $10,000, in two counts, one in indebit'tus assumpsit, and one upon quantum meruit, as will more

fully appear by reference to such record and declaration or writ, a copy of which is hereto attached, marked E.

Respondent admits that said declaration also contained a count upon an alleged agreement of petitioners to pay five per cent. upon the amount recovered on claim D, but that such count was so inserted solely to meet the possible contingency of such agreement being shown, and not from any knowledge the respondent had on the subject.

The respondent also admits that said suit was withdrawn after the institution of another suit in the District of Columbia, as stated.

Respondent admits that in January, 1872, he commenced another suit against the petitioners in the supreme court of the District of Columbia, and that process therein was served on the petitioners on the 15th day of January, 1872; that respondent claimed in said last named declaration $10,000 on a quantum meruit; and further says that the petitioners appeared and pleaded to such declaration; that said suit came on to trial in said court before a jury; that a verdict was rendered in favor of respondent against petitioners on the 13th of March, 1873, for $9,185.18; that petitioners thereupon filed their several motions for new trial, one of which was based upon the allegation that the said verdict was excessive, and on the ground of newly discovered evidence; that said motion was overruled and an appeal taken by the petitioners to said supreme court in general term; that on the 28th day of September, 1874, said court rendered judgment in favor of respondent and against petitioners for the amount of such verdict, with interest from the date of such verdict, and costs.

That petitioners prosecuted a writ of error upon such judgment to the Supreme Court of the United States, which court, after argument of counsel, affirmed said judgment, with interest and costs, which
54 last judgment was rendered on the 22d day of January, 1877, as by reference to the record and proceedings thereof now shown to the court will, among other things, more fully appear; and respondent prays that the same may be part hereof.

Respondent has no knowledge, except from said petition, whether said Palmer was absent from the District of Columbia, or whether said Stanton was lying sick at the time of such trial, nor does he remember whether Stanton endeavored to procure a postponement of such trial, but states that the petitioners' counsel was present and made a vigorous defence, as will more fully appear by the record of such trial.

Respondent further states that on said trial several witnesses were examined by petitioners' counsel, among whom was Samuel Churchman, the agent of petitioners named in said letter of said Stanton, dated June 21st, 1871, and marked C, hereto attached; also divers and sundry papers and documents were placed before the said jury.

That respondent had in court the books of said Atkinson, and was ready and willing to produce the same, as well as any papers that might have been in his possession; but whether the said letters of February 18th, 1870, and May 7th, 1870, were read to the jury, or what other specific evidence was there introduced respondent has no means of stating, for the reason that the bill of exceptions tendered by petitioners' counsel purports to contain but a portion of such evidence, and only a general statement thereof on such points as related to, and were in explanation of, the instructions prayed for by him, and respondent prays to refer to the said record before the court for greater certainty. Respondent, however, states that such letters were, as of right they should have been, in the possession of the petitioners, and could, during the long period that said suit was pending, have been found and pro-

duced with the exercise of ordinary diligence by said petitioners Stanton and Palmer; and respondent submits that even if he had in his possession copies of such letters or of any other letters relating to any agreement as to fees, he was not bound or required, or even requested, to produce the same.

Wherefore respondent demurs to said portion of said petition. Respondent further states that evidence was introduced by petitioners on said trial which was claimed by them as showing a contract of fees in said case, to be paid only in the event that said Atkinson collected the said claim; also, that such contract was for five per cent., as now claimed, but that the jury found both of said issues in favor of respondent, and for greater certainty respondent refers to said record.

55

Respondent admits that such suit was brought upon a quantum meruit, but denies that it was so brought to avoid any contract or agreement between said decedent and petitioners, and denies that he then knew, nor does he now know, of any such contract or agreement between said parties as to fees; and insists that even if any such contract or agreement had been entered into, proof of the same was admissible under the said pleadings, and avers that the evidence was introduced thereunder without objection, which was claimed as tending to prove such contract, as will more fully appear by reference to the record of such trial.

Respondent admits that he has commenced suit upon said judgment in order to obtain execution thereof from this court.

Respondent further saith that the petitioners are not, as he is advised by counsel and believes, entitled to the discoveries and production of the books, papers, documents, and letters sought; that all the books, papers, documents, and letters remaining of the effects are, and were at the time of the trial of said cause in the supreme court of the District of Columbia, in said District, and subject to the jurisdiction of said court, and he therefore pleads and sets up said judgment in bar of such order or decree.

Respondent further says that nearly six years have elapsed since the commencement of said suit in the supreme court of the District of Columbia; that fourteen months elapsed since the commencement thereof before trial, and the further period of eighteen months before judgment of said court; wherefore he respectfully submits that the plaintiffs have shown no such diligence in looking up evidence of which they had full knowledge, and which was in their possession, as to review the action and judgment of said court at this late day, as by said answer on file fully appears.

That at said time said parties appeared by their said counsel, and said court by the agreement of the parties appointed Hon. Origen S. Seymour a committee to hear and report the facts in said case to the superior court to be held at New London on the second Tuesday of September, A. D. 1878, within and for the county of New London, and continued said cause to said term.

56

That at the said September term the said committee made his report to said court as follows:

"That I took the oath by law provided, and met the parties by their agreement at Norwich on the 24th day of June, 1878, and on the 11th and 12th days of July, 1878, when and where the parties appeared and were fully heard, with their witnesses, exhibits and arguments of counsel, and on said hearing I find the facts as follows:

"The petitioners had the four distinct claims against the United States set forth in their petition, to wit:

"A. For the loss of the steamer Anglo American, which was entrusted to William Johnston, a counsellor-at-law, and collected on a fee of five per cent., said claim, amounting to $30,000.

"B. For repairs, etc., to steamers Anglo American and St. Charles, entrusted to E. Johnston and John Joliffe and the deceased, R. P. Atkinson, all three counsellors-at-law, who collected the same March 29th, 1866, and charged five per cent., per agreement, on the collection for their service, said claim amounting to $12,023.45.

"C. For services of steamer St. Charles, collected in 7-30's United States bonds, by said Atkinson, who deducted therefrom five per cent. in bonds as his fees for collection, and remitted the remainder; said claim amounting to $61,371.92, and collected by him April 29th, 1865.

"D. The last claim was for services of steamers Anglo American and St. Charles, amounting to $45,925.91, in the presentation of which claim the said Atkinson acted as the attorney for the petitioners from 1865 down to the time of said Atkinson's death, which occurred February 25th, 1871; the claim was collected March 10th, 1871, by said Palmer.

57 "After the collection of the above claim D the petitioners were bound to pay to the administrator of said Atkinson a fee of five per cent. on the amount collected, to wit, a fee of $2,296.29. This fee was due by virtue of a special agreement, which special agreement was recognized in the clearest manner in letters which passed between the parties in 1870.

"The fact that the deceased was entitled to this five per cent. commission by special agreement, and that he was not entitled under a quantum meruit to more than this stipulated commission, was proved to me by the letters aforesaid, and also by uncontradicted verbal testimony.

"In regard to the allegations in the petition that after the collection of claim C there remained in the hands of said Atkinson the sum of $1,534.36 due to the petitioners, I find that from 1865 onward there was a difference between the parties in respect to the fees for collecting claim C; the petitioners claiming that said Atkinson was entitled only to two and one-half per cent. for his individual fees in that case, and said Atkinson claiming and retaining as his fees five per cent. In 1870 a correspondence was had between the parties on this subject, and Mr. Atkinson evidently understood the petitioners to consent to his retaining five per cent. Upon this correspondence and upon the whole evidence, and upon the circumstance that in the trial at Washington, hereinafter mentioned, no claim was made by said Palmer and Stanton in regard to this $1,534.36, I find that nothing was or is due the said Stanton and Palmer on account of claim C, and that a balance of $2,296.29 became justly due from said Stanton and Palmer to said administrator on the collection, March 10th, 1871, of said claim D against the United States, which balance is still due and unpaid.

"Said Embry was duly appointed administrator of the said Atkinson, and all the books and papers of said Atkinson went into the custody and control of the administrator, and he sent said Atkinson's account for his professional services to George Pratt, esq., as particularly stated in the petition, which account was forwarded by said Pratt to the petitioners.

"The petitioners refused to pay this account, claiming to have legal defence against it, and also claiming an offset of $1,534.36. A suit

was thereupon commenced on the premises by Mr. Embry, as ad-
58 ministrator of said Atkinson, against the said Stanton and Palmer, returnable to the superior court of New London County November, 1871, demanding $10,000, with general count on a quantum meruit, and with a special count for a commission of five per cent. Said suit was withdrawn March, 1872. On the 13th day of January, 1872, said administrator entered another suit against the said Palmer and Stanton, on the law side of the supreme court of the District of Columbia, and served process thereon on said Stanton and Palmer January 15th, 1872, a full copy of the record of which suit is hereto annexed, to which record reference may be had to show the proceedings therein. At (the time of) the trial of this case at Washington neither Mr. Stanton nor Palmer were present in court. Mr. Palmer was at Stonington; his attendance might have been secured by reasonable diligence, if such attendance had been deemed very important. Mr. Stanton was ill at his hotel at Washington—too ill to attend the trial. His counsel asked for a postponement on that account; but no affidavit was offered in support of the motion, and it was denied. The petitioners' counsel appears to have been content to proceed with the trial in the absence of his clients. He had full, and, as it turned out, undue confidence in the legal defences which appeared by the record to have been set up at the trial, and took it for granted that in no event could more be recovered than $2,296.29. The letters of Mr. Atkinson of February 18th, 1870, and May 7th, 1870, recognizing the special agreement for five per cent. on claim D, were not in Washington at the trial there. They were received by Mr. Stanton, the active partner, at a time when his mind was much depressed. They were stored for safe-keeping at his home in Stonington, Connecticut, and the contents had escaped his recollection. They were not found by him until after the trial and the disposal of the case at the general term.

"After the commencement of the suit at Washington he made search for all letters and papers relating to the case, and placed in possession of his counsel such as he found; and he then supposed that he had found and placed in the hands of counsel all the letters and papers pertaining to the matters in suit. As bearing on the question how it happened that these letters escaped the recollection of Mr. Stanton, it appears that for several reasons the attention of the petitioners was not alive to the importance of being prepared at the trial in Washington with
the proof of the special agreement which the letters furnished,
59 (1.) Because the petitioners took it for granted that the full extent of the plaintiff's claim at the trial would be $2,296.29, that being the amount of claim D presented through Mr. Pratt; and it did not occur to them that a large amount might be claimed under the quantum meruit count. (2.) Because their counsel had undue confidence in legal defences against the entire demand, and therefore did not apprehend the full importance to the interest of his clients of being prepared with proof of the special agreement.

"As to specification 7th in the petition, Mr. Atkinson, while living had full knowledge that the amount due him was but $2,296.29, on a special contract for that amount, and he, if living, could not with a good conscience, have presented a claim for a greater amount. Mr. Embry, the administrator, knew that Messrs. Stanton and Palmer claimed a special contract, and was willing before trial was brought to settle on that basis; but his claim in court on a quantum meruit was not on his part an intentional suggestio falsi. He did not know that the claim was

unfounded; the full proof of the special agreement was not in his possession and had not been fully brought to his knowledge.

"The allegations of the petition under its eighth specification are found true as therein stated. In respect to the respondent's answer, the answer truly sets forth, in Exhibit A, the entries in Mr. Atkinson's books.

"The claim mentioned in the answer for services in the coal matter was, by mutual consent of parties, withdrawn as being irrelevant to the present controversy. The payment of draft for $45,925.21 to Mr. Palmer was made upon Mr. Palmer's assurances as stated in the answer. The statement in the answer regarding the letters from Senator Buckingham and Mr. Stanton, marked B and C, is correct; also, regarding no copies having been preserved of the letters of February, 1870, and May 7th, 1870, Mr. Atkinson, at the date of those letters, being in feeble health. In respect to that part of the answer which relates to lapse of time, the dates are correctly given.

"In respect to that part of the answer which avers that the letters of February 18th, 1870, and May 7th, 1870, could have been found and produced at the trial in Washington, with the exercise of ordinary diligence by said petitioners, I have in the foregoing report found specially the facts bearing upon that question, and upon those facts submit the question to the court.

"The respondent claimed that the record of the trial and judgment at Washington was conclusive of the rights of the parties, and
60 that no evidence was admissible to show that the facts were otherwise than as found by that record.

"The evidence offered by the petitioners was received, subject to all legal exceptions, with the right to take these exceptions to the court."

And this court accepted said report and found the facts therein stated to be true.

And said court reserved the questions of law arising thereon for the advice of the supreme court of errors, held at Norwich, within and for the second judicial district, on the 1st Tuesday of March, A. D. 1879, and said cause by legal continuances comes to the present term of said court; and now at this term the parties appeared by their said counsel, and said supreme court of errors having advised this court to grant the prayer of the petitioners on condition that the petitioners pay to the respondent the sum of $2,296.29 within such reasonable time as the superior court shall determine, together with the interest thereon from the 10th day of March, A. D. 1871.

And this court doth further find that said sum has by the petitioners been paid to and received by Daniel Chadwick, esq., attorney of said respondent, together with the interest thereon, from the 10th day of March, A. D. 1871, to this 12th day of July, A. D. 1879.

This court doth therefore order and decree that said James H. Embry, administrator as aforesaid, be, and he is hereby ordered and enjoined, under a penalty of twenty thousand dollars, payable to the petitioners, to altogether and absolutely abstain and desist from the further prosecution of said suit upon said judgment, and from instituting any other suit or action on said judgment, and from executing or in any manner enforcing said judgment against said petitioners. The whole amount found due by this court from the said firm of Stanton and Palmer to the estate of said Atkinson, to wit, the sum of $3,444.45, being here paid into court and received by the administrator of said estate by the hand of his attorney, Daniel Chadwick, esq.

It is further ordered and decreed, that the petitioners recover of said

Embry their costs of this petition, taxed and allowed to be the sum of four hundred and forty-one 39-100 dollars.

Decree passed July 12th, 1879.

61 *Motion in error.*

Superior court, New London County, June term, 1879.

JOSEPH W. STANTON ET AL.
vs.
JAMES H. EMBRY, ADMINISTRATOR.

The respondent, within twenty-four hours after final judgment, respectfully represents that he is aggrieved by the decisions of the court in this case upon the questions of law therein apparent on the record, and moves that the record in this case may be transmitted to the supreme court of errors, to be held at Norwich, within and for the second judicial district, on the first Tuesday of September, A. D. 1879, for the revision of the manifest errors therein contained, and for such errors the respondent assigns the following, to wit:

1. That judgment should have been rendered for the respondent instead of the petitioners.

2. That the judgment and decree in contravention of Article 4, section 1 of the Constitution of the United States, and section 905, chapter 17, title 13, of the Revised Statutes of the United States, in that it enjoins the prosecution of a suit on a judgment of the supreme court of the District of Columbia.

3. That the decree enjoins the collection of a judgment of a court of the United States.

4. That the respondent was not guilty of fraud in the obtainment of the judgment referred to in the pleadings in this case.

5. That no accident or mistake is shown in the rendition of said judgment.

6. That the judgment was based upon a verdict of a jury ren-
62 dered upon the value of the services rendered by respondents interested for petitioners, and that the fact not appearing on such trial of any specific contract was the result of the fault or negligence of petitioners.

7. That petitioners having elected to prosecute their supposed defences to defendants' demand in the United States Supreme Court, while the courts of the place where the judgment was rendered were open for a correction of the same in equity, the petitioners are bound by such election.

8. That petitioners have lost any remedy they may have had by their laches in asserting their equitable rights.

9. That the relief sought in their proceedings could only be had in the courts of the District of Columbia, where the judgment was rendered.

10. That the fact being shown that the petitioners, when called upon to pay the amount of $2,296.25, as agreed upon between them and respondent intestate, denied any indebtedness, partly on the legal defences they had against such claim. The respondent was warranted, in the absence of knowledge of any specific agreement, in submitting to the jury on the trial the value of the services rendered by his intestate; and while proof of such special agreement was within the knowledge

and power of petitioners to produce, it is error in this court to consider the merits of said judgment.

Wherefore the respondent says that said judgment ought to be reversed, and he be restored to all he has lost thereby.

JAMES H. EMBRY,
Administrator.

By his attorneys, A. L. MERRIMAN.
DANIEL CHADWICK.

This motion is allowed, and Daniel Chadwick is recognized in one hundred dollars, conditioned that the said James H. Embry, administrator, shall pay all demands if he fail to prosecute said motion to effect.

WEBSTER PARK, *Clerk.*

63 At a superior court held at Norwich, within and for the county of New London, on the first Tuesday of June, A. D. 1879.

Present, Hon. John D. Park, judge; Nathan D. Bates, sheriff; Webster Park, clerk.

Joseph W. Stanton and William L. Palmer, both of the town of Stonington, in said New London County, petitioners, vs. James H. Embry, of Washington, District of Columbia, administrator of the estate of R. J. Atkinson, late of said Washington, deceased, respondent, as by petition on file, dated the 18th day of October, A. D. 1877.

This petition was brought to the November term of this court, 1877, when the parties appeared and were heard on a demurrer filed by said respondent. And the court having heard the parties reserved the questions of law arising thereon for the advice of the supreme court of errors, at the March term, 1878, and by legal continuance this petition came to the June term, 1878, when, the supreme court having so advised, this court found the petition sufficient, and appointed Hon. Origen S. Seymour a committee in said case; and again by legal continuance said petition came to the September term, 1878, when the said committee made his report, which was accepted by the court, and what decree should be passed was reserved for the advice of the supreme court of errors at the March term, 1879, and again by legal continuance said petition comes to this present term; and now a decree, as on file, is passed by this court, in accordance with the advice of the supreme court of errors, and thereupon, within twenty-four hours after final judgment, the respondent moves that the record in this case may be transmitted to the supreme court of errors at its term next to be held at Norwich, within and for the second judicial district, on the first Tuesday of September, A. D. 1879, to wit, on the 2d day of September, A. D. 1879, for the correction of errors therein, which motion is allowed.

Attest:

WEBSTER PARK, *Clerk.*

A correct copy of record of the supreme court of errors.

Attest:

WEBSTER PARK, *Clerk.*

64, 65 STATE OF CONNECTICUT:

Supreme court of errors, second judicial district, September term, A. D. 1879, to wit, September 2d, A. D. 1879.

And now, the foregoing record in the within entitled cause having been

transmitted to this court, at the above-named term thereof, for the correction of the errors therein assigned, and the parties having been fully heard before this court, upon the 2d day of September, 1879, this court finds that there is no error apparent upon the record.

I, Webster Park, clerk of said supreme court of errors, in and for the second judicial district, of said State, do hereby certify that the within and foregoing is a correct copy of record of said court.

In testimony whereof I hereunto set my hand and affix the seal of said court this 30th day of September, A. D. 1879.

[SEAL.] WEBSTER PARK, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of errors of the State of Connecticut, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James H. Embry, administrator of R. J. Atkinson, deceased, appellant, and J. W. Stanton and W. L. Palmer, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statue of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in
67 favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1879, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER,
Asso. Jus. Sup. Court U. S.

68 The United States of America to J. W. Stanton and W. L. Palmer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of this month, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein James H. Embry, administrator of R. J. Atkinson, deceased, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 11th day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

SAM. F. MILLER.

69 On this 15th day of October, in the year of our Lord one thousand eight hundred and seventy-nine, personally appeared before me, the subscriber, clerk of the superior court in and for New London County, and State of Connecticut, Joab B. Rogers, a constable of the town of Norwich, in said county, known to me as such, and makes oath that he delivered a true copy of the within citation to Jeremiah Halsey, one of the counsel for the within-described appellees.

JOAB B. ROGERS,
Constable.

Sworn to and subscribed the 16th day of October, A. D. 1879.

[SEAL.] WEBSTER PARK,
Clerk of said Court.

70 Know all men by these presents, that we, James H. Embry, administrator of R. J. Atkinson, dec'd, and Austin P. Brown, of Washington, D. C., are held and firmly bound unto John W. Stanton and William L. Palmer, of the State of Connecticut, in the full and just sum of two hundred dollars, to be paid to the said John W. Stanton and William L. Palmer, or their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at a term of the supreme court of errors of the State of Connecticut, in a suit depending in said court, between J. W. Stanton & W. L. Palmer, petitioners, and James H. Embry, administrator of R. J. Atkinson, deceased, respondent, a decree was rendered against the said James H. Embry, adm'r, &c., and the said James H. Embry, administrator of R. J. Atkinson, dec'd, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said J. W. Stanton and W. L. Palmer, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of this obligation is such that if the said James H. Embry, administrator as aforesaid, shall prosecute his said writ of

error to effect and answer all costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) JAMES H. EMBRY, [L. S.]
Adm'r of R. J. Atkinson, dec'd.

" AUSTIN P. BROWN. [L. S.]

Approved by—

(Signed) SAM. F. MILLER,
Judge.

(Indorsement on cover:) No. 1065. James H. Embry, adm'r of R. J. Atkinson, dec'd, plaintiff in error, vs. J. W. Stanton and W. L. Palmer. Connecticut sup. c't of errors. Filed 11th November, 1879.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 144.

JAMES H. EMBRY, Adm'r of R. J. ATKINSON, dec'd,
Plaintiff in Error,

vs.

J. W. STANTON'S EXECUTOR and W. L. PALMER,
Defendants in Error.

Error to the Supreme Court of Errors of the State of Connecticut.

BRIEF FOR PLAINTIFF IN ERROR.

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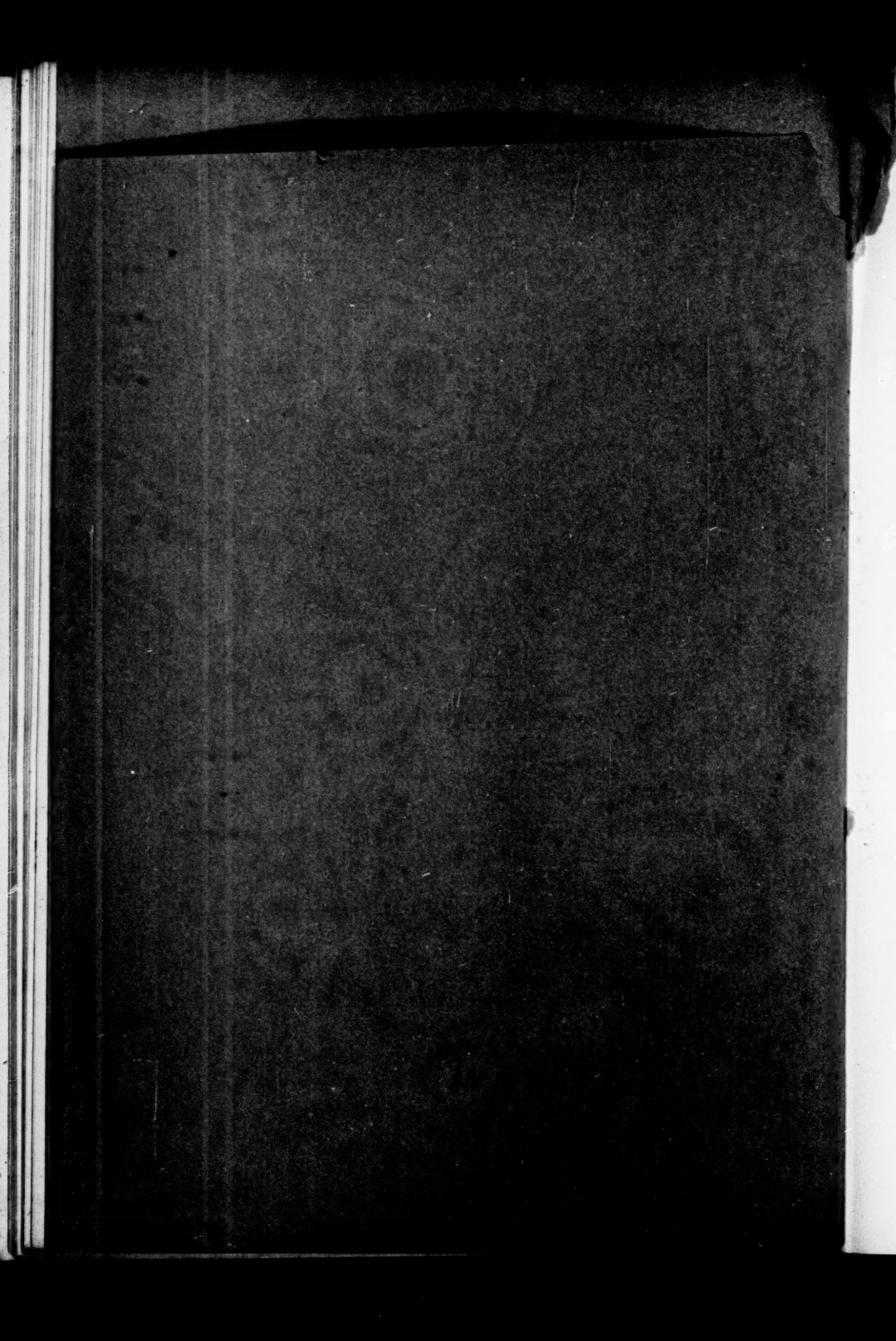

IN THE

Supreme Court of the United States.

JAMES H. EMBRY, ADMINISTRATOR,

vs.

J. W. STANTON'S EXECUTOR AND W. L. PALMER.

Error to the Supreme Court of Errors of Connecticut.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

In January, 1872, plaintiff in error brought suit in the Supreme Court of the District of Columbia against Stanton and Palmer upon a *quantum meruit* count to recover for professional services of his intestate, R. J. Atkinson, (Record, p. 15.) The case came to trial in March, 1873, before a jury (p. 21), on which trial the defendants urged upon the court certain legal propositions as a defense to the entire demand, which being overruled, exceptions were taken, and a verdict was rendered for $9,185.58, (pp. 24, 25.) In addition to the motion for a new trial upon the exceptions, the defendants also moved for a new trial for the reason of

excessive damages and because of newly-discovered evidence (p. 21), which motions were overruled and an appeal taken to the court in General Term, and on hearing in that court, in October, 1873, the judgment was affirmed and a writ of error sued out to the United States Supreme Court; but because of the omission of the Circuit Court to render judgment upon the verdict, the court, on the 28th of September, 1874, entered judgment in conformity with the verdict, and another writ of error was sued out to this court. The latter court, upon hearing, in January, 1877, affirmed the judgment so rendered with interest and costs.

Failing to have satisfaction of such judgment in the District of Columbia, a suit was brought upon said judgment in the Superior Court of New London county, Connecticut, at the September Term, 1877, for the purpose of having execution thereof in the latter State. On the 18th of October, 1877, the defendants filed their petition in the latter court praying for an injunction against the prosecution of said suit at law, and against executing or enforcing such judgment (p. 33), alleging that there was a special agreement between plaintiff's intestate and the petitioners, by which he was to receive for the services for which such judgment was rendered a fee of five per cent. upon the amount collected, which fee amounted to $2,296.25, and further claimed certain offsets to the demand, making the amount due less than $300, (p. 1;) that the terms of the special agreement were acknowledged by Atkinson in two letters written by him to said Stanton, the contents of which he charges were known to plaintiff; that these letters were received by Stanton while in affliction, and were stored away in his domicile and not found until after trial and appeal; that Stanton was sick and unable to attend the trial, and Palmer was absent at home at the time; that their attorney endeavored to obtain a postponement of the trial without success, (pp. 1, 5.) To this petition a demurrer was interposed and overruled by the court, (p. 7.)

An answer was then filed by plaintiff in error denying all knowledge of such special agreement, and set up the judgment so pronounced and its affirmance by the United States Supreme Court as conclusive of the merits thereof. It also charges laches on the part of petitioners, (pp. 8 to 11.)

The cause was referred to a Committee to ascertain and report the facts to the court.

The report of the Committee was approved by the court and embodied in the decree as the facts in the case, (pp. 37 to 40.)

The decree so embodying the report finds the fact that there was a special agreement between Atkinson and the petitioner for five per cent. upon the sum collected, such fee amounting to $2,296.25, which fact was proven by the letters referred to, and "also by uncontradicted *verbal testimony*"; that Atkinson, while living, knew this fact; yet that the plaintiff did not know of such special agreement, and therefore "his claim in court on a *quantum meruit* was not on his part an intentional *suggestio falsi*."

Upon the question of diligence, the report states that the letters were received by Stanton when his mind was much depressed, and were stored for safe-keeping at his home, and the contents had escaped his recollection, and the letters were not found by him until after the trial and disposal of the case in the General Term; that at the trial neither Stanton nor Palmer was present, Palmer being at home, but "whose attendance could have been secured by reasonable diligence, if such attendance had been deemed very important"; that Stanton was sick at his hotel in Washington, and unable to attend; that their counsel asked for a postponement on that account, but as no affidavit was offered in support of the motion it was denied, the counsel being content to proceed with the trial, he "having full and, as it turned out, undue confidence in the legal defenses."

The fact is further found that "the attention of the peti-

tioners was not alive to the importance of being prepared with proof of the special agreement; first, because they took it for granted that the full extent of the claim at the trial was $2,296.25, and second, because their counsel had undue confidence in legal defenses against the entire demand." The report also notes the fact that the respondent set up and claimed that the record of the trial was conclusive of the rights of the parties. Upon these facts the court, on payment into court of $2,296.25 and interest, granted a perpetual injunction enjoining plaintiff in error from the prosecution of said suit upon said judgment, and from instituting any other suit thereon, and from executing or in any manner enforcing said judgment, under a penalty of $20,000 (p. 40), and further decreeing the costs ($441.30) against plaintiff in error.

To this decree plaintiff filed his motion in error, assigning several causes of error, (p. 41.) And the Supreme Court of Errors of the State of Connecticut having affirmed such decree, a writ of error was sued out to this court. A motion made in this court to dismiss the writ of error for want of jurisdiction, upon the ground that the record does not show a case authorizing a writ of error to a State court, was denied, and therefore the case now stands for hearing upon the merits.

Assignment of Errors.

1. The State court of Connecticut decided against a right claimed under article 4, section 1 of the Constitution of the United States, and of the act of Congress passed in pursuance thereof.

2. The State court, in contravention of the said clause of the Constitution and of said act, decided against the conclusiveness of a judgment rendered by the Supreme Court of

the District of Columbia, and affirmed by the Supreme Court of the United States, which judgment was, by the law and usage in the courts of said District of Columbia, conclusive.

3. The said State court erred in its decree enjoining plaintiff in error from prosecuting the suit brought upon said judgment, and from instituting any other suit therefor, and from executing or enforcing the collection of said judgment.

4. Said court erred in reviewing the merits of the cause which had been so determined, and upon which judgment had been pronounced in the Supreme Court of the District of Columbia.

5. Said court had no jurisdiction over the case set up in the petition filed by defendants in error.

6. The petition and proofs show no case for the interposition of a court of equity.

7. The defendants in said judgment having elected to prosecute their supposed defenses in the United States Supreme Court, while the courts of the place in which the judgment was rendered were open for correction thereof, upon other legal or equitable grounds, such election was a waiver of such other legal and equitable defenses.

8. The defendants in error did not assert their alleged grievances in the proper courts.

9. The defendants in error did not assert their alleged grievances within the proper time.

10. The court should have dismissed said petition for want of equity.

11. As the record presents no question of fraud or want of conscience on the part of plaintiff in error, the courts of Connecticut were wholly without jurisdiction or power to render such decree.

ARGUMENT.

The main question in this case is whether the State court decided against a right claimed under the Federal Constitution and laws. The claim is made under article 4 of the Constitution, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and the Congress may by general law prescribe the manner in which such acts, records, and judicial proceedings shall be proved, and the effect thereof."

Under this clause of the Constitution, Congress declared the effect of the records of the courts of any State or Territory or country affixed thereto, proven as prescribed, to be that they should have such faith and credit given them in all the courts of the United States as they have by law or usage in the courts of the State from whence taken.

Sec. 905 Revised Statutes, p. 170.

In this case a judgment had been rendered in the Supreme Court of the District of Columbia in favor of plaintiff in error against the defendants in error, which judgment, upon writ of error to this court, was affirmed.

Upon a suit in the State court of Connecticut upon this record of judgment, a petition was filed by defendants in error to restrain the plaintiff from using this record in evidence in the suit at law, and the court on hearing enjoined plaintiff from the prosecution of said suit on the judgment, and also from instituting any other suit thereon, and from executing or in any manner enforcing said

judgment, and imposing a heavy penalty for so doing. Without more than merely adverting to the manifest impropriety and illegality of that part of the decree which directly interferes with the jurisdiction of the courts of the District of Columbia in the enforcement of its own judgments, the decree, in prohibiting the record from being read in evidence in that State, decided against the effect declared by Congress in that regard. The question as to the faith and credit to be given to the judgments of a sister State under this clause of the Constitution, has been frequently considered by this court; and the effect thereof has been uniformly held to be that such judgments, so long as they are not reversed or set aside, are conclusive, and that no plea thereto will avail except as to the jurisdiction of the court rendering the judgment, *nul tiel* record, or matters occurring after judgment.

Mills *v.* Duryea, 7 Cranch, 483.
Hampton *v.* McConnell, 3 Wheaton, 332.
Nations *v.* Johnson, 23 Howard, 203.
D'Arcy *v.* Ketcham, 11 Howard, 165.
Wheaton *v.* Reid, 11 Howard, 460.
Green *v.* Van Buskirk, 5 Wallace, 312.
Maxwell *v.* Stewart, 22 Wallace, 77.
Christmas *v.* Russell, 5 Wallace, 290.

In the latter case the court reviewed the authorities fully, and say (p. 304) that a judgment can be impeached only directly by writ of error, petition for new trial, or by bill in chancery. Again (p. 305): "Established rule is that, so long as the judgment remains in force, it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor;" and cites Voorhees *v.* U. S. Bank, 10 Peters, 449, Huff *v.* Hutchinson, 14 How., 588, and Benton *v.* Burgot, 10 Serg. & Rawle, 240. And on page 306 the opinion states that judgments, even if fraudulently obtained, must, nevertheless, be considered as conclusive

until reversed or set aside; and that otherwise than by writ of error a judgment can only be impeached by direct bill in chancery; and cites Granger *v.* Clark, 22 Maine, 130; Anderson *v.* Anderson, 8 Ohio, 108; B. & W. R. R. *v.* Sparhawk, 1 Allen, 448; Homer *v.* Fish, 1 Pick., 435; and McRae *v.* Mattoon, 13 Pick., 57.

To the same effect are the following:

Dixon *v.* Graham, 16 Iowa, 316.
Duvall *v.* Fearson, 18 Md., 502.
Atkinson *v.* Allen, 12 Vt., 624.

It is, however, contended, and the court to which this writ of error was directed, in a prior case, (Olney *v.* Pearce, 20 Conn., 544,) held, as a reason for the interposition of a court of equity to enjoin the collection of a judgment of a sister State, that, having the parties to the judgment before it, it could by decree operate upon the person of plaintiff in the judgment without operating directly upon the judgment.

"What a defendant cannot do directly, he cannot do collaterally by evasion." So says this court in Voorhees *v.* U. S. Bank, 10 Peters. This terse phrase is universal in its application, and applies to courts as well as individuals.

In this case the court went a step further. It stayed the proceedings of the law court and directed service by mail, so that the plaintiff, a non-resident, was compelled to come within the jurisdiction personally, in order to relieve the suit at law from the bar interposed; and, having thus compelled appearance, takes jurisdiction, and by its decree virtually annuls the judgment so rendered in a sister State, even at home.

Courts of equity are equally bound by this provision of the Constitution with courts of law, the language of the act being "all courts of the United States."

In Bicknell *v.* Field, 8 Paige, 444, Chancellor Walworth says: "I am satisfied this court has no jurisdiction over the parties to a judgment obtained in a sister State to restrain their proceedings in the courts of that State. If the judgment was fraudulently entered, the proper remedy of the complainant appears to be to apply to that court to set aside the judgment. The Constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. That provision of the Constitution is as binding upon this court as it is upon the Supreme Court."

The case of Pearce *v.* Olney, however, addresses itself to a court of equity in a different manner from the case at bar. That case, as well as Rogers *v.* Gwin, 21 Iowa, p. 60, and Ward *v.* Quinlillan, 57 Mo., p. 425, were cases where the defendants, by reason of the agreement of the plaintiffs not to prosecute the suits, made no appearance and no defense; and in the Iowa decision are likened to the case where the jurisdiction of the court is questioned, as where the appearance of the party is entered by an attorney without authority. They do not come certainly within the rule that a party who goes to trial and makes defense is bound by the verdict in all facts proved, or which might be proved; for they, by the agreement and consent of the plaintiffs, had left the court and could make no defense. Again, to constitute fraud in the obtaining of a judgment, there is, of necessity, some act of the plaintiff; and it might be that where the party has committed an act of fraud, a court of equity may have the power to enjoin the person from continuing such fraud, wherever he may attempt to do so, without reference to the judgment.

But this rule will not apply in the courts of another State when the verdict was not the result of some act of the plaintiff in fraud, or against conscience, and especially

where the defendant, by undue confidence in other defenses, neglects to prove his real defense.

But even this power is held by the better authorities to be in opposition to the clause of the Constitution quoted.

The clause quoted is but an affirmance of the common law, founded upon the fitness of things, that when one court has jurisdiction over a case, other and outside courts cannot interfere. In the case of Meadows *v.* The Duchess of Kingston, Ambler, 756–762, Lord Apsley says: "Fraud upon a court in obtaining a judgment or sentence can only be examined by the court where the fraud is committed, or another having concurrent jurisdiction."

Davy *v.* Haddon, 3 Doug., 313.
Prudham *v.* Phillip, Ambler, 763.
Rex *v.* Vincent, Strange, 481.
Nash *v.* Wells, 1 Lev., 235.

Hilliard on Injunctions, p. 194, 3d ed., says: "If a defendant wishes to avoid the effect of a judgment improperly rendered against him, he should apply to the court in which it was rendered, and if he does not so apply it seems a court of chancery will not inquire beyond the record into the manner by which the judgment was rendered;" and cites Home *v.* Woolsey, 2 Ed. Chy., 289. (See, also, Cottle *v.* Cole, 20 Iowa, 481.)

In the case of McRae *v.* Mattoon, 13 Pick., 53, where the defendant alleged fraud in obtaining the judgment sued on in North Carolina, where rendered, the court says: "The whole current of authorities seem to recognize the principle that where a cause has been instituted in the proper forum, where all matters of defense were open to the party sued, *the judgment is conclusive* until reversed." * * * "If any proceedings have taken place there which would avoid the judgment obtained against the defendant upon writ of error, or if a new trial should be granted, the application must be made to the judicial tribunals there. But

so long as the judgment remains in full force the courts of Massachusetts cannot go behind it."

Such, also, is the tenor of Christmas *v.* Russell, in which, speaking of equitable relief from a judgment, the court says that a judgment can be impeached only by a *direct* bill in chancery; meaning one that operates directly upon the judgment, and which could be effected only by a court of the place where the judgment is.

Another theory of defendants is, that although at law the judgment is conclusive, yet as the equity courts of the District of Columbia may interpose after judgment, therefore, under the act of Congress prescribing the effect of such records, the courts of equity of another State have the same right.

This theory is met by several propositions:

1. As has been shown, the record of a judgment of a court of one State or Territory in full force is conclusive in any court of the United States where offered in evidence.

2. It has also been shown that the only power to correct a judgment, whether erroneous or wanting in equity, rests in the courts having jurisdiction over the judgment, either through appellate jurisdiction or through equity powers.

3. If the foregoing propositions should be held as being too broadly stated, it may be repeated that, in order to warrant the interposition of the courts of a State different from the one in which the judgment was rendered, there must have been some act of the party, in fraud or against conscience, to enable such court to attack the record through the person, and that such act must be of a nature to have prevented a trial on the merits. In this case there is nothing of the kind. It is true the petition vaguely charges it to have been against conscience in the plaintiff to declare upon a *quantum meruit* when there was a special agreement

as to fees between plaintiff's intestate and defendants, and also with *suppressio veri* in not producing evidence thereof on trial.

But it is not averred in the petition that the declaration, with the bill of particulars showing what was claimed, was not before them; nor that they could not have proved the agreement at the trial, if diligence had been exercised; nor that they had no knowledge of the fact. Hilliard on Injunctions, p. 194, says: "Equity cannot relieve against a verdict for being contrary to equity, unless the former plaintiff knew the fact to be different from what the jury have found it, and the defendant was ignorant at the time of the trial." Much less can the courts of another State grant such relief.

Inasmuch as the defendants made the alleged agreement, and were both alive at the trial, it is pretty certain that they knew all about it. The record shows the fact to be that the plaintiff did not know of the special agreement, (p. 39.) Consequently his only safe course in declaring was upon a *quantum meruit*, and it could hardly be considered a suppression on his part of a fact of which he was ignorant, and of which his adversaries had full knowledge.

It is also shown by the record that there was other proof than the letters of the fact of the agreement, but no excuse is given for not producing such proof on the trial. *Why* they did not is also shown, (p. 39;) that they were not alive to the importance of it; first, because they took it for granted that the claim would not exceed $2,296.25, the amount agreed upon; second, because their counsel had undue confidence in the legal defenses against the entire demand, and did not apprehend the importance of being prepared with proof of the special agreement.

It results, then, in a case where a party seeks a new trial, for reasons of omission of evidence without fault of the adversary and going solely to the question of excessive

damages, over which the court trying the case has exclusive control.

Lowry *v.* Smith, 1 John. Ch., 320, was a bill to restrain the collection of a judgment, alleging excessive damages through subornation and perjury, and newly discovered evidence showing the excess of damages to be founded upon a fictitious sale of salt contrived for the occasion. Chancellor Kent, in delivering the opinion, says: "The cases of relief in equity against judgments at law, founded in fraud, are where the fraud goes to the whole judgment, and not to excess of damages," and dismissed the bill.

4. The equity court of the District of Columbia could not, under the laws and usages governing it, have vacated the judgment on a petition of this nature, filed at the date of this petition.

The statute of Maryland of 1778, (Thompson's Digest, 173,) in force in the District of Columbia, provides that where a judgment shall be set aside for irregularity, surprise, fraud, or deceit, the clerk of the court shall enter on the records a continuance of the cause from the term at which the judgment was rendered to the term at which it was set aside, and then from term to term until finally disposed of.

Rules 89 and 90 of the Supreme Court of the District provide a remedy for the same causes by motion on the law side of the court, but the rules further provide that such motion cannot be made if the mover shall, after knowledge of such irregularity, surprise, fraud, or deceit, take any fresh step in the cause. This rule accords with and makes the law of the court, whether by motion or bill, the usage prevailing in courts of equity as to laches; and so well established is this usage that this court, in the case of Bronson *v.* Schultzen, 104 U. S. Rep., 410, say

"that negligence and laches are equally effectual bars to relief."

Creath's Admin. *v.* Sims, 5 How., 191.
Semple *v.* Barnes, 14 How., 70.
Walter *v.* Robbins, 14 How., 584.
Brown *v.* Buena Vista, 95 U. S., 157.
Hendrickson *v.* Hinckley, 17 How., 443.

In Throckmorton *v.* United States, 98 U. S. Rep., p. 61, the court says:

"There are no maxims of the law more fully established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *interest rei publicae ut sit finis liturae* and *nemo debet bis vexari pro una et eadem causa.*"

The rule goes further. It affirms another rule of law, equally well established, governing courts of equity, that a litigant shall not, after knowledge of his real or equitable rights of defense, proceed with the cause keeping such real or equitable defense in reserve; or, to illustrate with the facts shown in this case, that defendants cannot be permitted to prosecute their defenses resting upon legal questions, and going to the whole action, and if unsuccessful in that, be at liberty to reopen the judgment for the trial under new defenses, either by motion or bill in equity, going to part only.

Hendrickson *v.* Hinckley, 17 How., 443, presents a case of a defendant who, having a claim of set-off, relied on other defenses, electing to reserve his claim of set-off for future action. Judgment having gone against him, he filed his bill to enjoin the collection of the judgment until his claim of set-off could be adjudicated. The court held that, having made his election of defenses in the suit at law, he was bound thereby. See also Home Ins. Co. *v.*

Stamfield, 1 Dil., 429; Marine Ins. Co. *v.* Hodgson, 7 Cranch, 336; Phœnix Ins. Co. *v.* Risley, 13 Wall., 616.

As has been already shown, the defendants have no equity in their case, and for that reason, if for no other, the courts of equity of the District could not grant the prayer of the petitioners.

Suit was originally brought in January, 1872, by declaration clearly stating the cause of action. Issue was joined and trial was had in March, 1873. On the trial, in addition to the issue of fact made in the pleadings, the defendants urged certain propositions of law, which, being ruled adversely, the case was carried by them first to the court in General Term and then to the U. S. Supreme Court, where a like decision was rendered in January, 1877, five years after the commencement of the suit. The petition was filed nine months thereafter, in October, 1877. This is such inexcusable laches that, under the decisions above quoted, the court was bound to notice it. Whatever might have been their right to move for a new trial on the law side of the court after writ of error, the court of equity was open to a party willing to do equity. But in this case there was no offer, or even indication, on the part of the defendants, that they were willing to carry out the alleged agreement, until all hope of doing better for themselves was closed against them by the decision of this court, nor for nine months thereafter, and not until threatened with another judgment, sought for execution where they had property.

There was no unfairness, much less fraud or evasion, on plaintiff's part in this matter. Although he had no knowledge of any agreement between his intestate and defendants, yet supposing from the previous dealings there might have been an understanding between them to the same effect, he was willing to settle upon that basis up to the time of trial. (Record, p. 39.) But upon their denial of any indebtedness, he did precisely what was his duty as ad-

ministrator to do. He instituted suit for what the court and jury should find the services of his intestate to be worth, leaving to his adversaries, who knew whether or not there was any agreement as to the price to be paid, to enlighten the jury on that point. And that is where the responsibilty rested, and should have rested. If they, for the reason that such agreement, if established, would weaken their other supposed defenses, or for any other reason, chose to omit such proof, relying, as it appears, on other proof as to the amount due, or whether their omission to prove the agreement was caused by their own negligence, the result was alone attributable to them.

There was no injustice done the defendants in the verdict and judgment. They had received full consideration in the professional services of the plaintiff's intestate. The jury by their verdict so said. The court trying the case, in overruling the motion for a new trial, in which motion one of the grounds was excessive damages, so declared. It may be possible that Atkinson had agreed to take less than his services were worth, for lawyers sometimes do such things; but the defendants, in repudiating the terms of the contract, and in their attempts through the courts to deprive the widow and children of what they now admit to have been due, waived the advantage they might have had under the good-natured concession of Atkinson, and they should now pay what the court and jury have determined his services were worth.

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17-3

Supreme Court of the United States.

OCTOBER TERM, 1879.

JAMES A. EMBRY, ADMINISTRATOR,
PLAINTIFF IN ERROR.

vs.

STANTON & PALMER,
DEFENDANTS IN ERROR.

No. 1065.

Error to the Supreme Court of Connecticut.

BRIEF ON MOTION TO DISMISS PLAINTIFF'S WRIT OF ERROR.

The plaintiff in error, in January, 1872, sued the defendants in the Supreme Court of the District of Columbia to recover the value of the professional services rendered by his intestate to the defendants, and in March, 1873, obtained a verdict for $9,185.18, the defendants, as it appears from the facts found by the court in the present suit, going to trial without being prepared to prove an express agreement between Atkinson (plaintiff's intestate) and themselves as to the fees, but relying on the legal defense pressed upon the court, and believing that in any event the verdict would not exceed the amount agreed upon.

A motion for a new trial was made and overruled, and an appeal taken to the said Supreme Court *in banc*.

The rulings of the Circuit Court being sustained, and that court entered judgment on the verdict in September, 1874,

and the defendants sued on a writ of error to this court, which, in January, 1877, affirmed the judgment below with interest and costs.

The plaintiff, in August, 1877, commenced a suit in the Supreme Court of New London county, Connecticut, for the purpose of obtaining execution thereon in that State. The defendants met that suit by a bill in equity, charging, among other things, fraud on the part of plaintiff in suppressing the fact of such agreement. To this bill in equity a demurrer was interposed and overruled, and then an answer was filed, setting up, among other things, the said judgment so obtained in the Supreme Court of the District of Columbia, its affirmance by this court, and the conclusiveness thereof. The fact was found, however, by the court upon the report of the committee that the plaintiff in error had committed no fraud in the matter of such suit, for he was not aware of such agreement, although up to the time of trial he had been willing to accept the amount claimed by the defendants in error to have been agreed upon.

The Equity Court, upon the hearing and payment of the sum found by it to have been agreed upon, to wit, $2,296.25, with interest, made the injunction against the plaintiff perpetual, enjoining him from further prosecuting such suit at law, or any other suit upon such judgment, or of attempting to collect the same under a penalty of $20,000.

From this decree plaintiff in error appealed to the Supreme Court of Errors of the State of Connecticut, alleging, among other things, that said decree was in contravention of article 4, section 1 of the Constitution of the United States, and section 905 of the Revised Statutes, in that it enjoins the prosecution of a suit on a judgment of the Superior Court of the District of Columbia.

The said Supreme Court of Errors, the highest court of the State of Connecticut, affirmed the decree of its inferior court, and the plaintiff in error prosecutes his writ of error to this court.

The question now is, whether the Supreme Court of Errors,

in its decision, has decided against a right which had been claimed under the Constitution of the United States, or under the act of Congress enacted under the provisions of the same. If so this court has jurisdiction.

It is a settled principle of law that no defense can be sustained to a suit brought on a judgment of a court of competent jurisdiction in the courts of a sister State.

The case of Mills vs. Duryee, 1 Cranch, 481, is the leading case on this question. This was a suit brought upon a judgment of the District of Columbia court, in a State to which the plea of *nil debet* was interposed, and on demurrer the plea held bad, the court holding that where the court rendering the judgment had jurisdiction over the person by personal service, and when such records were properly exemplified, under the constitutional provision aforesaid, and the act of Congress declaring the effect of such records, such judgment was conclusive in the courts of a sister State.

This court, again, in the case of Christmas vs. Russell, 5 Wal., 290, after an exhaustive review of the law and authorities, affirmed the doctrine laid down in Mills vs. Duryee.

In the intermediate period between the decisions above referred to, certain of the State courts made an exception to the general rule as laid down in Mills vs. Duryee, so far as to permit fraud to be shown in the recovery of a judgment, even in the courts of a sister State, but as the court has in this case found against the fact of fraud, such exception, even if it could be made, would be immaterial.

Andrews vs. Montgomery, 19 John, 162.
Borden vs. Fitch, 15 John, 121.
Cochran vs. Fitch, 1 Sandf. Clay Rep., 142.

In the case of Green vs. Sacramento, 1 Pet. C. C., Rep. 74. the court, in discussing the question, doubts whether, even in cases of fraud, the courts of a sister State can take cognizance of the defense.

The true rule seems to be that if the party against whom a judgment has been rendered, even in cases of fraud, should

apply for relief to the court having jurisdiction over the judgment and records.

Bicknell vs. Field, 8, page 440.

Chancellor Walworth saying, in the opinion in that case, p. 444: "I am satisfied this court has no jurisdiction over the parties to a judgment obtained in a sister State to restrain their proceedings in the courts of that State. If the judgment was fraudulently entered, the proper remedy of the complainant appears to be to apply to that court to set aside the judgment. The Constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. *That provision of the Constitution is as binding upon this court as it is upon the Supreme Court.*"

Therefore, when a court of equity of one State attempt to control the actions of a court of another State, or of the parties thereto, as in this instance, where the plaintiff is enjoined from applying to the court of the District of Columbia where the judgment was rendered for execution, such act is in violation of the Constitution of the United States; as Chancellor Walworth well says, the Constitutional provision is as binding on that court as upon the courts of law.

As the counsel states, the Supreme Court of the District of Columbia is at the same time, under the Constitution and laws, a court of law, a court of equity, a court of bankruptcy, a court of probate, and a criminal court, all these courts being courts of particular jurisdiction, though presided over by the same judges, consequently it has power to correct its own judgments if any wrong or injustice has been done therein. It is a court of full and complete jurisdiction, and the judgments or decision of any branch thereof having jurisdiction is final and conclusive between the parties, unless reversed, modified, or vacated by the court having control over its records. If the law branch of the court commits error in its proceedings, the agrieved party has his remedy by appeal, first to the said court *in banc* and, secondly, to this court, or if his case calls for the interposition of an

Equity Court, he may apply to the equity branch of the court. In this case the defendants elected, however, to rest their defense upon the legal points involved, and prosecuted their appeal to the court *in banc* and writ of error to this court, and did not apply to the equity branch of said court for any relief, notwithstanding the many years that elapsed after said verdict and the final determination of the suit in this court.

When a judgment properly exemplified is sent to a sister State such record is entitled to full faith and credit, and is conclusive, and it is no objection to it that it is erroneous, unless the proper appellate tribunal upon appeal or writ of error reverses it; and there is no distinction in the principle between judgments that may be reversed on legal proceedings and such as may be set aside by equitable proceedings. In both cases the action must be had in the court having jurisdiction over the judgment and records. Both comity and the Constitution dictate this principle.

In the case of Green vs. Van Buskirk, 5 Wal., 312, a motion similar to the one at bar was made. That was a writ of error to the Court of Appeals of the State of New York, and the question was whether that court had decided against a right which had been claimed under the Constitution and act of Congress. The facts were as follows: Green and Van Buskirk were creditors of one Bates, all citizens of New York State; Bates, the debtor, was the owner of certain iron safes in Chicago, Illinois, and, to secure Van Buskirk, Bates gave him a bill of sale of the safes. Two days afterwards, and before the bill of sale was recorded in Illinois, Green, without notice of the mortgage, instituted proceedings in the Illinois court against Bates by attachment and levied upon the safes, obtaining judgment in the attachment proceedings; he had the safes sold in satisfaction of the judgment. Van Buskirk afterwards sued Green in the State Court of New York for the value of the safes. Green in defense set up the attachment proceedings. The State Court overruled the defense and rendered judgment against Green.

This court held the writ of error to be well taken and overruled the motion to dismiss. The case was subsequently heard upon its merits, and the judgment of the State Court reversed. Reported in 38 Howard, (N. Y. Br. Rep.) 52. The principles enunciated in that case would seem to settle the question involved in this motion.

The plaintiff in error, therefore, maintains that his right under the Constitution and Statutes of the United States to have his judgment rendered in the courts of the District of Columbia treated as a conclusive one, and to have due effect given thereto in the courts of the States of the Union, was denied to him by the courts of the State of Connecticut, which courts, upon a bill filed by the defendant in error to set aside his judgment and enjoin the prosecution of the same, did, upon the facts found by a committee, ~~set aside such judgment and~~ enjoin the plaintiff in error from prosecuting it in those courts or elsewhere, although the conclusiveness of the judgment was set up and the due effect thereof claimed. And when the facts so found were not sufficient to justify the action of such courts, or if sufficient, which the plaintiff in error maintains they were not, could only be taken cognizance of by the courts of the District of Columbia where his judgment was rendered. Dupasseur vs. Rochereau, 21 Wal., 130, 134.

LANDER & MERRIMAN,
Attorneys for Platntiff in Error.

17-3

IN THE

Supreme Court of the United States.

October Term, 1879.

EMBRY, ADMR. OF ATKINSON,

PLAINTIFF IN ERROR,

vs.

J. W. STANTON AND W. L. PALMER.

No. 1065.

Error to the Supreme Court of Errors of the State of Connecticut.

MOTION TO DISMISS.

And now, December 4th, 1879, Durant & Hornor, attorneys for defendants in error, J. W. Stanton and W. L. Palmer, move the court to dismiss the writ of error herein, on the ground that this honorable court is without jurisdiction under R. S. U. S., 709, for the reasons following:

Because no Federal question was properly raised in or decided by the supreme court of error of the State of Connecticut.

And that this motion be made returnable on Monday, January 26, 1880.

DURANT & HORNOR,
Atty's for Defendants in Error.

ARGUMENT.

This case involves the limitations provided by statutory law for the exercise of the judicial power of the United States under Article III of the Constitution. "In all the "other cases before mentioned the Supreme Court shall "have appellate jurisdiction, both as to law and fact, with "such exceptions and under such regulations as the Con- "gress shall make."

"A final decree in any suit in the highest court of a "State in which a decision in the suit could be had, * * "where any title, right, privilege, or immunity is claimed "under the Constitution of the United States, and the de- "cision is against the title, right, privilege, or immunity "SPECIALLY SET UP OR CLAIMED by either party under such "Constitution, * * * may be re-examined and re- "versed or affirmed in the Supreme Court upon a writ of "error. The writ shall have the same effect as if the decree "complained of had been rendered or passed in a court of "the United States."

See R. S. U. S., 709.

Art. VI of the Constitution reads: "This Constitution, "and the laws of the United States which shall be made "in pursuance thereof, * * * shall be the supreme "law of the land; and the judges in every State shall be "bound thereby, anything in the constitution or laws of "any State to the contrary notwithstanding." * * "And "all executive and judicial officers, both of the United "States and of the several States, shall be bound by oath "or affirmation to support this Constitution."

In view of these provisions of positive law, and the irresistible presumptions arising therefrom, the National Judiciary has declared, over and over again, the positive

definitions and requirements for actual decisions in cases like the present.

First. The judiciary department of a State is an indispensable organ of the National Judiciary; and to all the acts of the former full faith and credit must be attributed by the latter. Hence, before the exercise of any appellate jurisdiction by the latter over the former, under R. S. U. S., 709, a Federal question must exist in the pleadings, affirmed on one side and denied on the other, and which question, on principles of law existing many thousands of years anterior to the Constitution, your Honors are without judicial power to supply in the case of its non-existence in the pleadings.

Second. And not only must the question exist in the pleadings as embodied in your record, but there must also exist a final decision of the highest court of the State *against* the claim which generates the Federal question.

But in and around this record there is neither a Federal question nor any decision *against* a claim involving a Federal question.

The suit is a bill in equity to enjoin the execution of a judgment rendered by a law court. It is an original suit brought by the original debtors at their domicil against their creditor, who voluntarily applied to the courts of the State of Connecticut for relief;—for a judgment making executory his law judgment rendered by the supreme court of the District of Columbia and affirmed in the Supreme Court of the United States. It was a judgment in favor of the administrator for the contingent fee of a deceased lawyer, the amount of which was determined not by contract, but on a *quantum meruit*. In reason, it is obvious no distinction can be made in judgments at law by refer-

ence to the particular courts rendering them. The Connecticut court sitting in equity was bound on every principle of right, as your Honors will cheerfully admit, to regard this judgment as of no more worth, *qua* judgment, than if it had been rendered by the most inferior law court in the country. The equity jurisdiction over law judgments extends to all law judgments of all law courts, to all cases where the chancellor's *subpœna* can reach the parties. And in all cases of law judgments, no matter by what court rendered or by what court affirmed, equity has the clearest jurisdiction to enjoin perpetually if the law judgment be "one of which it would be AGAINST CON-"SCIENCE for the person who has obtained it to avail him-"self."

Insurance Company *vs.* Hodgson, (7 Cranch, 332,) is quoted as an authority for what has been stated as an obviously reasonable principle.

But equity, when enjoining perpetually the execution of law judgments, always proceeds on the assumption that such a judgment exists at law in full force and virtue. This is the very basis of the equity jurisdiction; for how could the execution of *a non-existent* be enjoined? Indeed, the entire theory of equity is that this law judgment is right in the highest degree, that it is *summum jus*, and which if not arrested by the right hand of the chancellor will grow rapidly into *summa injuria*.

The supreme court of the District of Columbia is at the same time, under the Constitution and laws of the United States, a court of law, a court of equity, a court of bankruptcy, a court of admiralty, a probate court, and a criminal court, all these being courts of particular jurisdiction, though presided over by the same judges. Yet in a proper case the equity court might enjoin the execution of the judgment of the law court, or a decree in bankruptcy, or a

judgment of the probate court receiving proof and ordering execution of a will; and might, perhaps, by *habeas corpus* stay or enjoin the execution of a criminal. But in none of these cases is any attack made on the force and validity of the judicial action in these separate courts.

So in this case, after your Honors had affirmed the law-judgment of the supreme court of the District of Columbia, the equity court of the District was open to the judgment-debtors for precisely the same relief as has been extended to them in the Connecticut State court. And it is equally clear these judgment-debtors would have received at the hands of the chancellor of the District of Columbia, and from his learned brethren sitting in general term, and from your Honors on appeal, the same measure of relief had the plaintiffs in error attempted to enforce their law-judgment in the District of Columbia, and had the defendants in error made their application for an injunction in this District instead of in Connecticut, and for the plain reason that to such relief they were equitably entitled.

We look in vain in this record either for a Federal question raised in the pleadings or for any decision either for or against one. "Why, look at page — of the Record," exclaims the purchaser of the writ of error, and you will find it asserted "that the judgment and decree is in contra-"vention of article 4, section 1, of the Constitution of the "United States, and section 905, R. S. U. S., in that it en-"joins the prosecution of a suit on a judgment of the su-"preme court of the District of Columbia."

Of its kind, this is evidently a *prius* to an indefinite number of Federal questions. None like it seems to have ever reached this court before through the great conduit, section 709. You ask the Connecticut courts *to execute* your law-judgment, and then ask the same courts to declare that they were without judicial power *to enjoin* this

execution for which you prayed them? And not satisfied with the declension of those learned and appreciative judges to answer your Federal question, now solemnly bring it hither for adjudication?

The execution of a judgment is an element of the judicial procedure of the court rendering the judgment, or of the court which is asked to make such judgment executory. The national courts do not, the State courts cannot, enjoin the executions issued by each other. No national court could enjoin Embry's execution obtained from the Connecticut State court, for a two-fold reason: *first*, because such a course is prohibited by positive law; *second*, because no national court could entertain jurisdiction over a plaintiff who was *not a citizen of a State*. How, then, can a citizen of no State evolve a *Federal* question out of matters of strict *procedure in a State Court?*

How can the issuance of an injunction give jurisdiction to this court under R. S. U. S., 709?

We pray your Honors for a judgment of dismissal for want of jurisdiction.

Respectfully submitted.

DURANT & HORNOR,
for Defendants in Error.

WASHINGTON, D. C., *December* 11, 1879.

OFFICE SUPREME COURT U. S.
FILED
DEC 5 1882
JAMES H. McKENNEY, CLERK

17-3

In the Supreme Court of the United States.

October Term, 1882.

EMBRY, Administrator,
Pl'ff in Error,
vs.
J. W. STANTON & W. L. PALMER.

No. 1144

Brief for Defendants in Error.

This is a writ of error to the supreme court of errors of the State of Connecticut, under R. S. U. S., 709.

The decree complained of sets forth all the pleadings both of the complainants and the defendant (plaintiff in error;) the report of the committee on the facts of the case, and the acceptance of the same and findings of fact therein stated to be true; the advice of the supreme court of errors of Connecticut to grant the prayer of petitioners on condition that they pay $\$2{,}296\frac{22}{100}$ within such reasonable time as the superior court shall determine, with interest thereon from March 10, 1871.

"And this court doth further find that said sum has by the "petitioners been paid to and received by Daniel Chad- "wick, Esq., attorney of said respondent, together with the "interest thereon from March 10, 1871, to July 12, 1879.

"This court doth therefore order and decree that said James "H. Embry, administrator as aforesaid, be and he is hereby

" ordered and enjoined under a penalty of $20,000, payable " to the petitioners, to altogether and absolutely abstain and " desist from the further prosecution of said suit upon said " judgment, and from instituting any other suit or action on " said judgment, and from executing or in any manner en- " forcing said judgment against petitioners. The whole " amount found due by this court from the said firm of " Stanton & Palmer to the estate of said Atkinson, to wit, " the sum of $3,444 45/100 being here paid into court and re- " ceived by the administrator of said estate by the hand of " his attorney, Daniel Chadwick, Esq.

" It is further ordered and decreed that the petitioners " recover of said Embry their costs of this petition; taxed " and allowed to be the sum of $441.39."

Decree passed July 12, 1879.
Record, pp. 30 to 41.

This decree was affirmed by supreme Court of Errors September 30, 1879, and then this writ of error.

Record, p. 43.

The case is reported as Stanton *vs.* Embry, administrator, 46 Connecticut Reports, on the demurrer, page 65, and on the merits, page 595, of the same volume.

The Federal question intended to be raised, by means of which appellate jurisdiction will vest in this court under R. S. U. S., 709, may be thus stated, (following the decision in Dupasseur *vs.* Rochereau, 21 Wall., 130:) " Whether " the validity or due effect of a judgment of a United States " court was disallowed by a State court;" or more definitely, in the present case, did the Connecticut court in its decisions refuse to give effect to the judgment of the Supreme Court

of the District of Columbia, rendered upon the point in dispute, and with jurisdiction of the case and the parties?

ARGUMENT.

Embry invoked the jurisdiction of the Connecticut court *ex proprio motu* in his action of debt to make the judgment executory, which he had obtained in the District of Columbia. The Connecticut court was thus invested with plenary jurisdiction *at law* over the whole of Embry's judgment.

Stanton and Palmer, alleging an *equitable* defence to this law-judgment, filed their bill in equity, averring fraud and want of good faith in procuring the said judgment at law, and praying for a discovery, an account, the production of documents, and a perpetual injunction. Embry's demurrer to this bill in equity was overruled with leave to him to answer to the merits.

46 Conn. Rep., 65.

It is very clear that this demurrer presented but one point; was the judgment at law obtained by Embry and sought to be made executory, absolute, final, and conclusive in his favor in equity as well as at law. In other words, did the allegations of the bill in equity devolve on the Connecticut court any right of examination into them? Had that court any jurisdiction, any right, whatever *to proceed at all?*

If there was a beginning of jurisdiction in equity the court had a right to go on and decide the whole case.

1 Pomeroy's Equity, § 181.
Ober *vs.* Gallagher, 3 Otto, 206.

And it is likewise clear that the Federal question now relied on to give this court appellate jurisdiction was immediately presented by this demurrer and decided, and thus was

constituted the case which your Honors are now called upon to entertain and decide.

It is respectfully submitted that Embry, after enjoying the chances of a litigation on the merits, should not now be allowed to go back to his Federal question involved in his demurrer. On its decision he should have taken his writ of error. "Pleading over to a declaration adjudged good on "demurrer is a waiver of the demurrer." "It is not compe- "tent to a party to assent to a proceeding in the court below, "take his chance of success, and, upon failure, come here "and object that the court below had no authority to take "the proceeding. *This point comes before us at every term,* "*and is always decided the same way.*"

Mays *vs.* Fritton, 20 Wall., 418.
Kennard *vs.* Morgan, 2 Otto, 480.

Another objection urged to a review by this court of the final decree of the highest court of Connecticut is: That it "appears of record that the whole amount found due by "this court from the said firm of Stanton & Palmer, to the "estate of said Atkinson, to wit, the sum of $3,444.45–100, "being here paid into court and received by the administra- "tor of said estate by the hand of his attorney, Daniel "Chadwick, Esq."

Rec. p. 40.

This seems to be an entire voluntary acquiescence in the decree, an admission of the regularity and validity of the proceedings; and to preclude a recourse to this court for relief. It disposes of one main part of the decree. Successive appeals in the same case would be an intolerable evil. Besides, could any execution issue upon the decree? Does it work an irreparable injury? Has it not been, by the

receipt of the money, deprived of the characteristics of a true, final judgment?

Forgay *vs.* Conrad, 6 Howard, 204.
Railroad *vs.* Ketchum, 11 Otto, 289.
U. S. *vs.* Babbitt, 3 Transcript, 757.

The grounds urged by the plaintiff in error in behalf of your Honors' jurisdiction are:

1st. That the decree complained of is in contravention of the full faith and credit clause of the Constitution and of R. S. U. S., 905.

2d. That it enjoins the collection of a judgment of a court of the United States.

3d. That the relief sought in equity could only be had in the courts of the District of Columbia where the judgment was rendered.

No contravention of the faith and credit clause can be shown. As long as law and equity are administered separately in the courts of the United States and of the several States, the right of an equity court to enjoin the execution of a law court's judgment on the ground of fraud, accident, or mistake must be recognized as a true principle. Indeed, it is not contested here by Embry. (See argument on demurrer, 46 Connecticut Rep., p. 72.) But a suit in chancery enjoining the execution of a law-judgment cannot by any legal possibility present a Federal question under the faith and credit clause of the Constitution, because the action of the chancellor is based on and proceeds from the prior recognition of the validity and conclusiveness of the law-judgment; and as he finds it so he leaves it. "The suit in "chancery does not draw into question the judgment and "proceedings at law, or claim a right to revise them." To suppose for a moment that the supreme court of Connecticut has transformed itself into a court of review, and striven

to correct the errors of the court of law of the District Columbia in rendering a judgment and the errors of this court in affirming it, is quite untenable. What the Connecticut court has done has been not in contradiction of the judgment, but in affirmance of it. "It does in this way "what right and justice require, and what, from the inflexi- "bility of the principles upon which a court of law proceeds, "it could not do."

Parker *vs.* Judges, 12 Wheaton, 561.
Nixdorf *vs.* Smith, 16 Peters, 132.
Hungerford *vs.* Sigerson, 20 How., 160.

It is wholly immaterial what court, domestic or foreign, renders the law-judgment which is sought to be enforced. This also is a proposition too clear to be argued. All final judgments have a particular sanctity attached to them, but this depends not on the character of the judges or the courts rendering them. Every law court is liable to the error of rendering a judgment, the execution of which may be enjoined by the chancellor on a proper showing. He sees only *in personam;* his right-hand writ of injunction goes only against *the person of the plaintiff* attempting to make use of judicial instrumentalities for the enforcement of an unconscious claim, and he arrests the action. There is no superior sancity in the law-judgments of the supreme court of the District of Columbia over the law-judgments of any State courts. Neither the quantity, quality, or measure of the judgment at law itself, or of the jurisdiction of the court rendering it, is in any way or in any shape involved or impaired in the slightest degree. The law-judgment stands just as it was rendered, pending the chancery proceedings as well as subsequently.

In fact, any contention that the law-judgement is conclusive and bars all examination into its record by a bill in

equity to set it aside for fraud, accident, or mistake, if true, would be a denial of the defendants in errors' right to sue at all, and would shut the door of all courts, State and national, against them. For nothing is better settled than that such a bill in equity is a new suit, an original and independent proceeding. Therein the complainants are in the exercise of equitable primary rights, and entitled to equitable remedies, fully set forth and prayed for in their bill, all of which were virtually unknown to the law court rendering the judgment, the execution of which was enjoined. Besides, this law-judgment could be executed nowhere else in the known world than in the "ten miles square" without another judgment of another law court or an action of debt or its similitude. It was barren of all result outside of the District without such action. In Embry's opinion, it could only be be fructified by the law-judgment of a Connecticut court. In this he was altogether right; but that judgment he has never yet obtained; and he now complains that after asking the Connecticut court at law to make his judgment executory, another Connecticut court *in equity* has taken control of his case, and, as he avers, without jurisdiction. He admits the right of the chancellor to enjoin the execution of judgments rendered by Connecticut courts on account of fraud, accident, or mistake, but contends that *a higher degree* of faith and credit must be given to judgments rendered by the court of the District of Columbia and affirmed by your Honors; and that these judgments must not be enjoined on manifest equities without incurring the risk of reversal in all such cases by this court under R. S. U. S., 709, for transgression of the constitutional requirement. A bill in equity to enjoin execution of a law-judgment on the grounds of fraud, &c., can never generate a case under R. S. U. S., 709, for the simple reason that the very ground on which the chancellor proceeds is that there

is a valid, binding, conclusive judgment at law, the force and effect of which are fully admitted and can never be denied. And is not this the "full faith and credit" of the Constitution? Nor does the chancellor attempt to revise the error and irregularities, or the legality and correctness of the law-judgment. But he engages in the trial and investigation of a new case and new facts. Can your Honors find in this class of cases, *ratione materiæ*, any reason for embracing them all within your appellate jurisdiction as fixed by statute?

Barrow *vs.* Hunton, 9 Otto, 83.

This is the serious, and, indeed, the sole question of any importance in the case. If overruled definitively, and if it be found that there exists a Federal question, regularly pleaded and issue joined thereon, and decided against the defendant in error, we then submit that such Federal question was properly decided.

The full faith and credit clause of the Constitution has been often before your Honors, and it seems to have been interposed here for the sole purpose of conferring jurisdiction under R. S. U. S., 709, and Murdock *vs.* Memphis, (20 Wall., 626.)

The "full faith and credit" applied to a judgment means that *this* shall have *the same* credit, validity, and effect in every other court within the United States which it had in the State where it was rendered.

Mills *vs.* Duryea, 7 Cranch, 484.
Hampton *vs.* McConnell, 3 Wheat., 234.
Dobson *vs.* Pearce, 12 N. Y., 156.

This latter case is important, and was very fully considered, and really involves the very point under consideration in the

case at bar, except that here the judgment enjoined was rendered by a Federal court, and not, as in that, by a State court.

The syllabus in Dobson *vs.* Pearce reads:

"Where plaintiff in a judgment recovered in this State "(N. Y.) brought an action upon it in the superior court of "Connecticut, and thereupon the defendant in the judgment "filed a bill against the plaintiff on the equity side of the "same court, alleging that the judgment was procured by "fraud and praying relief; and the plaintiff in the judg- "ment appeared in and litigated the equity suit, and the "court adjudged that the allegations of fraud in obtaining the "judgment were true, and enjoined the plaintiff from prose- "cuting the action upon it: *Held*, in a suit in the court of "this State by the assignee of the plaintiff on the judgment, "that a duly-authenticated copy of the record of the pro- "ceedings and judgment in the Connecticut court was con- "clusive evidence that the judgment was obtained by fraud."

Here it will be observed that the New York court gave to the record of the equity suit in Connecticut the absolutely conclusive effect of the thing adjudged, and made it binding on the plaintiff in error as to the facts.

In other words, the judgment at law was on one side only *conclusive* as to the points of law actually controverted and decided, and no farther. The Connecticut court, on the other side, had jurisdiction in virtue of certain *other* facts and points, and decided the whole case definitively. To these *other* points and facts and the conclusions therefrom, the full faith and credit of the Constitution were due.

Dobson *vs.* Pearce, *ut sup.*
Hopkins *vs.* Lee, 6 Wheat., 109.

Had the law-judgment which Embry sought to make executory in Connecticut been rendered by a State court (*e. g.*, New York) under this authority of Dobson *vs.* Pearce, the decree herein rendered would be conclusive in every State court of the Union upon Embry.

Does the fact that Embry's law-judgment has been rendered by the supreme court of the District of Columbia, a United States court, distinguish the present case from judgments of State courts in general?

It has been said that judgments by Federal courts do not come under the full faith and credit clause of the Constitution, but are provided for by act of February 5, 1867, sec. 2, "an authority exercised by a State repugnant to the "United States Constitution, treaties, or laws."

Dupasseur *vs.* Rochereau, (21 Wall., 134,) in which it was expressly decided that "the only effect that can be justly "claimed for the judgment in the circuit court of the United "States is such as would belong to judgments of the State "courts rendered under similar circumstances." But judgments are divided properly into two kinds only, domestic and foreign; domestic, those rendered by any court, Federal or State, of competent jurisdiction; foreign, those rendered by tribunals outside of the limits of the United States. But this distinction has no influence on the chancellor; all judgments, if unconscientious, may be restrained and justice done. All chancellors have this jurisdiction to enjoin executions on these judgments. And this principle is not peculiar to courts where law and equity are administered in separate tribunals. Where law and equity are combined in the same courts, or where equitable defences are permitted to suits at law, (Pennsylvania,) a judgment may be opened or the execution stayed on a proper showing. It is always a question of legal discretion with the lower court. "It is an appeal

" to the equity of a law court." "And if relief refused, " equity courts have jurisdiction."

White *vs.* Leeds, 51 Penn., 187.
Wistar *vs.* McManes, 54 Penn., 318.

In Louisiana, where no appeal is allowed to equity, except in the absence of express law, ample provision has been made for judgments " obtained through fraud or other ill " practices."

C. P. 607, Barrow *vs.* Hunton, 9 Otto, 83.

And this doctrine, in Louisiana, applies just as fully to judgments of Federal courts as to those of the courts of the several States.

Niblett *vs.* Scott, 4 La. An., 246.

So, also, in Maryland.

Barney *vs.* Patterson, 6 H. and J., 182.

Nor can Embry be allowed to profit by his change of jurisdiction from a State to a national court, and by urging that a law-judgment rendered by the supreme court of the District of Columbia, even though affirmed by the Supreme Court of the United States, stands, either on reason or on authority upon any higher ground than a law-judgment rendered by a State court. Any Federal circuit court sitting in equity would have the undoubted right, on a sufficient showing, to enjoin the execution not only of its own law-judgment, but also the law-judgment of any other Federal circuit court or State court, or any other judgment, domestic or foreign, for when the question before chancellor is: " Was the judgment " complained of obtained through fraud or other ill prac-

tice ?" he sees only the parties before him; he sees the results, not the means and instrumentalities mediating them; he acts on the persons before him; he leaves standing the judgment exactly as it was rendered; he performs the whole of his duty by operating upon the execution of the judgment; exactly as has been done in this case. And in this, we submit, he pays all proper respect to the tribunal, domestic or foreign, rendering the judgment. In all that was done in this case, your Honors cannot by possibility find a single thing but what was within the plain power and competency of the supreme court of the District of Columbia, or of the circuit courts of the United States, sitting in equity. And if they possessed the judicial power to enjoin for cause, *à fortiori*, was this power lodged in the chancery court of Connecticut; for to this very jurisdiction Embry voluntarily submitted himself as soon as he brought suit, "debt on judg- " ment," on the law side of that court.

On a careful examination, and directing attention to the in every way eccentric court established by Congress for the District of Columbia, we see that it combines the functions both of a Federal circuit court and of a State court, which in the several States of this Union are entrusted to separate, distinct, and *quasi* independent jurisdictions, and that it possesses more powers than either or both. Admiralty, bankruptcy, equity, common and ecclesiastical law, municipal and criminal law, patent law, &c., &c., being all combined within its extensive jurisdiction, we may be led to distinguish the different kinds of judgments it renders. Those involving matters pertaining exclusively to the sphere of Federal jurisdiction springing out of the United States Constitution, treaties, and statutes, and those involving mere questions of law between individuals, and coming within the ordinary sphere of the jurisprudence of the State courts. Whatever may be said of the impropriety of a State court

enjoining the execution of decrees in admiralty, bankruptcy, or in patent cases, *e. g.*, still no such argument should prevail here; for the judgment—the execution of which has been perpetually enjoined—is an ordinary case as at law, and would have been tried as such in the courts of Maryland had not the soil of the District been transferred in full and exclusive sovereignty to the United States. This judgment is precisely equivalent, therefore, to an ordinary judgment at law of any State court based on general principles, and having nothing to do with that statutory construction which might generate a Federal question. This distinction is radical and visceral, and grows necessarily out of the very nature of your Honors' appellate jurisdiction under R. S. U. S., 709.

If, however, your Honors find that, on the contrary, the Federal question was erroneously decided, we then ask your Honors to affirm the decree complained of on its merits.

The record contains none of the testimony in the case. The decree is based upon the findings of fact by a committee. These facts being then the judicial facts of the case, are the conclusions of the Connecticut judges therefrom erroneous?

The opinion of the court (46 Connecticut Rep., p. 595) quotes but one case, and that merely argumentatively. The principles there laid down are briefly these:

First. Embry, administrator, as assignee of his decedent, stands in the same position as his assignor as to the equities arising upon his right of action.

Second. The decedent, if living, neither in the forum of law nor in that of equity or conscience, could have asked for or received or retained the judgment which was rendered in his name on the motion of his representative. Had he done so, it would have been fraud, for he had *all* knowledge. He could not have used the forms of law in any

court for the enforcement of it; equity would bar him in every jurisdiction.

Third. Embry had not "full knowledge" that the contract was as he originally stated it to be; for him to have obtained it was unintentionally to have moved the court to an act of injustice. That act cannot be made to rest on his ignorance; the judgment still remains without foundation.

It is submitted that the Connecticut court properly disposed of this case, and that the decree below should be affirmed.

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J. HALSEY,
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WASHINGTON, D. C., *November* 15, 1882.